BRF128

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ROBERTO ANTONIO GÓNZALEZ-CALLES,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEY FOR PETITIONER

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FIRST QUESTION PRESENTED

Whether the Circuit Court improperly held that a prompt curative instruction during the last jury argument rendered harmless prosecutor Wolfe's devastating accusation petitioner had serious similar extraneous cocaine smuggling offenses where:

(1) no evidence had been introduced to support the prosecutorial assertion that petitioner is the "virus that spreads it (the cancer of cocaine) through his airplanes ... he had flown" (Pet.App. 112-113);

(2) earlier the district court had specifically instructed this prosecutor at pretrial not to make any reference whatever to extraneous offenses without first approaching the bench;

(3) this prosecutor responded at pretrial both that he would comply with that court order; and that while there was evidence petitioner entered the country on numerous occasions, this prosecutor did not think that was evidence of other crimes, since the evidence "doesn't say that on the other occasions they were hauling cocaine or anything";

(4) the prosecutor deliberately violated the trial court's instruction and his own promise to the district court and defense counsel to first approach the bench before getting into this area;

(5) the circuit court characterized as "weak" the evidence of petitioner's guilt;

(6) petitioner testified asserting as his sole defense his lack of knowledge of the odorless, hidden contraband;

(7) absent the prosecutor's prejudicial reference to not only past but future extraneous cocaine smuggling offenses by petitioner, the jury might not have returned its verdict of guilty;

(8) petitioner timely and properly requested the district court grant a mistrial as to the past similar acts; and

(9) the trial court overruled petitioner's objection to the future similar acts speculation by prosecutor Wolfe.

SECOND QUESTION PRESENTED

Whether the Circuit Court improperly failed to hold that the district court committed plain error and petitioner was denied a fair trial when the district court instructed the jury that "... you can infer a person has possession over something [the contraband] if ... he is the driver of a vehicle or pilot of a plane or the like" (emphasis added), since petitioner had testified explaining that his sole defense was that although he was the hired pilot of the plane, he did not know the plane was loaded with contraband.

THIRD QUESTION PRESENTED

Whether the Circuit Court improperly affirmed, since there had been a violation of the constitutional principle that nothing can be added to an indictment without the concurrence of the indicting grand jury, where (1) the grand jury charged in the indictment's count 2 that petitioner violated the law by importing marihuana; (2) but on that count 2 petitioner was convicted for importing cocaine; (3) the petitioner and his counsel agreed "to amend the indictment if it could legally be done"; and (4) without resubmission to the grand jury, the prosecutor immediately crossed out the word "marihuana" in the indictment and replace it with the word "cocaine".

FOURTH QUESTION PRESENTED

Whether the Circuit Court incorrectly relied on "airplane trim evidence" when the parties' attorneys both in effect explained during jury final argument that based on the evidence before the jury, "trim" was not a part of this lawsuit.

FIFTH QUESTION PRESENTED

Whether the evidence is insufficient to support the conviction on each count, where the circuit court affirmed petitioner's conviction but characterizes the evidence as "this is a close case" and "we might have reached a different result had we been the jurors in this case."

LIST OF ALL PARTIES BELOW

The parties at the Fifth Circuit were the same as in this Court.

STATEMENT OF RELATED CASES

This case has not previously been before this Court. However, certain of Gonzalez' issues are already pending now but are unresolved by this Court. See Ray v. United States, ___ U.S. ___, 107 S.Ct. 454, 93 L.Ed.2d 400 (1986); Salgado v. United States, 86-1386.

IDENTITY OF DEFENSE COUNSEL BELOW

Gonzalez was represented at the District and Circuit Courts by attorney Joseph A. Connors III.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	
FIRST	i
SECOND	iv
THIRD	v
FOURTH	vi
FIFTH	vii
LIST OF ALL PARTIES BELOW	viii
STATEMENT OF RELATED CASES	viii
IDENTITY OF DEFENSE COUNSEL BELOW	viii
THIS TABLE OF CONTENTS	ix
TABLE OF AUTHORITIES	
Cases	xi
Statutes	xiv
Rules	xiv
United States Constitution	xiv
TABLE OF CONTENTS TO APPENDIX TO THIS PETITION	xv
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS	3
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	6

ARGUMENTS FOR GRANTING WRIT

Reasons For Reviewing:

FIRST QUESTION 17
SECOND QUESTION 30
THIRD QUESTION 39
FOURTH QUESTION 44
FIFTH QUESTION 57

CONCLUSION 63

APPENDIX ATTACHED TO PETITION FOR WRIT OF CERTIORARI 66

RELEVANT CONSTITITIONAL, STATUTORY AND RULE PROVISIONS

Fifth Amendment 67

28 U.S.C.
1254(1) 67
1291 68

18 U.S.C.
3231 68
2 68

21 U.S.C.
812 69
841 71
846 74
952 75
960 75
963 77

28 U.S.C. 2111 77

Fed.R.Cr.Proc.
52 77

TABLE OF AUTHORITIES

Page

Cases

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 21

Francis v. Franklin, 471 U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) 34-35

Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) 6, 57-58

Griego v. United States, 298 F.2d 845, (10th Cir. 1962) 33

Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) 21

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 58

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 58,63

Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, ___ L.Ed.2d ___ (1969) 35

Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) 42

United States v. Carroll, 582 F.2d 942 (5th Cir. 1978) 42-43

United States v. Consolidated Launderies Corp., 291 F.2d 563 (9th Cir. 1961) 43

United States v. Del Alguila-Reyes, 722 F.2d 155 (5th Cir. 1983) 37

United States v. Escobar De Bright, 742 F.2d 1196 (9th Cir. 1984) 31

United States v. Glasgow, 658 F.2d 1036 (5 Cir. 1981) 61

United States v. Hastings, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) 21-22

United States v. Jackson, 700 F.2d 181 (5th Cir. 1983), cert. denied, 464 U.S. 842, 104 S.Ct. 139, 78 L.Ed.2d 132 (1983) 60

United States v. Jackson, 526 F.2d 1236 (5th Cir. 1976) 62

United States v. Ledesma-Hernandez, 729 F.2d 310 (5th Cir. 1984) 37

United States v. Littrell, 574 F.2d 828 (5th Cir. 1978) 60

United States v. Miller,
471 U.S. ___, 105 S.Ct. 1811,
85 L.Ed.2d 99 (1985) 40

United States v. Murdock,
290 U.S. 389, 54 S.Ct. 223,
78 L.Ed. 381 (1933) 32

United States v. Musgrave,
444 F.2d 755 (5th Cir.
1971) 32-33

United States v. Musgrave,
483 F.2d 327 (5th Cir. 1973),
cert. denied, 414 U.S. 1023,
94 S.Ct. 447, 38 L.Ed.2d 315
(1973) 44

United States v. Norris,
281 U.S. 619, 50 S.Ct. 424,
74 L.Ed. 1076 (1930) 40

United States v Ramirez,
670 F.2d 27 (5th Cir. 1982) 44

United States v. Stephenson,
474 F.2d 1353
(5th Cir. 1973) 61

United States v. Stewart
Clinical Laboratory, Inc.,
652 F.2d 804 (9th Cir. 1981) 43

United States v. Williams-
Hendricks, 805 F.2d 496
(5th Cir. 1986) 59,61

United States v. Young, ___
U.S. ___, 105 S.Ct. 1038,
___ L.Ed.2d ___ (1985) ... 23

Vaccaro v. United States,
461 F.2d 626, (5th Cir.
1972) 34

Statutes

18 U.S.C.
2 2,4-5
3231 2
1291 2

21 U.S.C.
812 2
841 2
841(a)(1) 4-5
841(b)(1)(A) 4-5
846 2,4
952 2
952(a) 3-4
960 2
960(b)(1) 3-4
963 2-3

28 U.S.C.
1254(1) 2
1291 2
2111 2

Rules

Fed.R.Cr.Proc.
52 2

United States Constitution

Fifth Amendment 2,42
Due Process Clause 30,34,38

TABLE OF CONTENTS TO APPENDIX TO PETITION FOR WRIT OF CERTIORARI

	Page
TABLE OF CONTENTS	2
ORDER DENYING REHEARING	3
CIRCUIT COURT'S JUDGMENT	4
CIRCUIT COURT'S OPINION	5
DISTRICT COURT'S JUDGMENT	41
INDICTMENT	44
ALL DEFENDANTS' MOTION IN LIMINE AND FOR NOTICE BY THE GOVERNMENT OF THE INTENTION TO RELY UPON OTHER CRIMES EVIDENCE AND FOR A CONTINUANCE UNTIL SUCH NOTICE IS GIVEN WITH SUPPORTING MEMORANDUM ...	48
DISTRICT COURT'S ENTIRE FINAL CHARGE TO THE JURY	66
RELEVANT JURY ARGUMENT	109

TO THE UNITED STATES SUPREME COURT:

Petitioner Roberto Antonio Gonzalez-Calles respectfully prays that a writ of certiorari issue to review the December 17, 1986 judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinions and judgments of the district court and the circuit court (Pet.App. 3-39)[1] are unreported.

JURISDICTION

This appeal stems from conviction of crimes against the United States. The district court for the Southern District

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[1] Citations to the Appendix to the petition for writ of certiorari will be to its pages as "Pet.App. ___". Record citations will be to "R.__" (pp. 1 to 201) for the Clerk's Record and to the Reporter's Transcript as "1T.__" (pp. 1 - 200), "2T.__" (pp. 201 to 400), "3T.__" (pp. 401 to 600), and "4T.__" (pp. 601 to 734).

of Texas, Brownsville Division had jurisdiction under 18 U.S.C. 3231. The circuit court had jurisdiction under 28 U.S.C. 1291. Its judgment and opinion were entered on December 17, 1986. (Pet.App. 3-39.) The petition for rehearing was overruled on January 26, 1987. (Id. at 2.) This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

The numerous applicable rules, statutes, and constitutional provisions are printed in the appendix attached to the conclusion of this petition. (App.Attach.Pet. 66-77.) They are: Fifth Amendment, U. S. Constitution; 18 U.S.C. 2, 3231; 21 U.S.C. 812, 841, 846, 952, 960 and 963; 28 U.S.C. 1254(1), 1291 and 2111; and Fed.R.Cr.Proc. 52.

STATEMENT OF THE CASE

On February 11, 1986, Carlos Benjamin Gonzalez-Calles and this petitioner were originally indicted in a four-count indictment in Cause No. B-86-049. (R. 5-6.) Its Count 1 alleged that "from on or about January 16, 1986, to on or about January 18, 1986" each named defendant knowingly and intentionally conspired "with each other and with other persons unknown to the Grand Jurors to unlawfully import into the United States from a place outside the United States a quantity of cocaine," in violation of 21 U.S.C. 963, 952(a) and 960(b)(1). Count 2 alleged each named defendant knowingly and intentionally imported into the United States from a place outside of the United States approximately 125 pounds (gross

weight) of "marihuana"[2] on or about January 18, 1986, in violation of 21 U.S.C. 952(a) and 960(b)(1) and 18 U.S.C. 2. Count 3 alleged that "from on or about January 16, 1986, to on or about January 18, 1986," each named defendant knowingly and intentionally conspired "with each other and with other persons unknown to the Grand Jurors to unlawfully possess, with intent to distribute a quantity of cocaine," in violation of 21 U.S.C. 846, 841(a)(1) and 841(b)(1)(A). Count 4 alleged each named defendant knowingly and intentionally possessed, with intent to distribute, approximately 125 pounds

---

[2] In his third question presented, petitioner is raising the legal issue as to whether or not the U.S. Magistrate could legally permit prosecutor Guerra to amend the indictment by crossing out the word "marijuana" and replacing it by the word "cocaine".

(gross weight) of cocaine on or about January 18, 1986, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(A) and 18 U.S.C. 2. (R. 5-6.)

On February 20, 1986, petitioner pled not guilty. (R. 7.) Trial was had before a jury from April 7 through 10, 1986. (1T. 25 to 4T. 726.) The jury found petitioner guilty of all four counts. (R. 7, 14.) On May 15, 1986, the trial court imposed sentences on petitioner of ten years imprisonment on each count to run concurrently. $50 special assessments were imposed on each count for a total of $200. Written notice of appeal was timely filed on May 23, 1986. (R. 8.) The circuit court entered its judgment of affirmance on December 17, 1986. (Pet. App. 3.) Petitioner is presently incarcerated serving the sentence herein.

STATEMENT OF THE FACTS

Viewing the evidence and all reasonable inferences which may be drawn therefrom in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), the jury trial evidence shows these events occurred.

The government presented its evidence. (1T. 55 to 2T. 390.) The defense presented its evidence. (3T. 407 to 4T. 638.) There was no rebuttal.

On January 18, 1986, at approximately 5:05 p.m., petitioner and his brother arrived at the public airport in McAllen, Texas, aboard a 1972 Cessna Skywagon Model 185, a single-engine airplane. Petitioner was the pilot of the plane, and his brother was a passenger. Petitioner and his brother disembarked, and brought their

luggage to customs for inspection. They made a negative declaration, saying that they were not bringing anything into the United States. (1T. 120-126, 163.)

While petitioner and his brother were in the customs office, customs agent Louis D. Hall boarded the plane with his dog, Royker, which was trained to detect narcotics, to conduct a search of the plane. Royker indicated that drugs were present in the plane, and customs agents Andreas Funk and Thomas J. DeMichelle entered the plane to search it. (1T. 92-97, 165; 2T. 326-327.) After determining that no contraband was visible (2T. 346), agent DeMichelle noticed a small tear in a vinyl partition in the rear bulkhead of the plane. Upon enlarging the hole and shining a flashlight inside, the agent was able to

see plastic bags in the compartment behind the bulkhead. A knife was inserted into the hole, and a white powder was on the knife when it was withdrawn. This powder field tested positive for the presence of cocaine. (1T. 165; 2T. 326-328.) The agents then removed the screws securing the bulkhead and discovered three large plastic bags, weighing approximately 125 pounds, and containing approximately 110 pounds net weight of cocaine. (1T. 61-67, 131, 166.) The bags were tested for fingerprints, and some were obtained, but these did not match the fingerprints of either petitioner or his brother. (1T. 166; 2T. 332.)

After the discovery of the cocaine, petitioner and his brother were arrested and advised of their Miranda rights. (1T. 168-169.) Petitioner made statements to

the effect that he did not know that the cocaine was in the airplane. (1T. 173-174.) Petitioner "had a piece of registration from Guatemala and it stated that it [the plane] belonged to their brother ... Victor Gonzalez." (2T. 344.) Petitioner had letters in his possession authorizing him to take the airplane to Hobby airport in Houston for repairs and from a Roger Delgadillo who was going to buy the plane from Victor. Petitioner also had $700 in cash for his expenses. (2T. 516-520.)

Frank Medina, a DEA chemist from Dallas, Texas (1T. 55), testified there were a total of 50 packages, each weighing about one kilo. The substance in those packages was L-cocaine that comes from the coca plant. 50,478 grams was the actual cocaine's net weight of the 50 packages.

That was 111 3/4 pounds of 95 percent pure cocaine. (1T. 61 to 76.)

U.S. Customs Service agent Louis D. Hall testified that on January 18, 1986, he and his dog ROYKER helped find the cocaine in the plane. That cocaine does not have an odor that ordinary humans can detect. The dog's smell is about 150 to 200 times greater than a human's smell, so humans can not discriminate that odor like the dog can. (1T. 91 to 109.)

U.S. Customs Officer David Longoria testified that over one hour advance notice of the defendants' arrival had been received by the Federal Aviation Administration (FAA). The FAA contacted Customs. That is the way it is supposed to happen on any aircraft. Longoria inspected petitioner's baggage and did not find the smallest trace of cocaine. No

pistol was found in the luggage or on the plane. (1T. 120 to 143.)

Immigration Service employee Cesar Martinez testified that he reviewed petitioner's El Salvador passport which showed that petitioner had entered the U.S. "approximately 39" documented or stamped times since May 27, 1981. The majority of those documented entries were at Miami, Florida or Port Everglades, Florida. The other countries listed were: Guatemala, the Cayman Islands, and Costa Rica. Martinez did not find anything illegal about that passport. (1T. 144-158.)

Customs' special agent Andreas Funk testified that petitioner's flight plan agreed with what petitioner had told Inspector Longoria: that petitioner had

left Guatemala City, fueled in Veracruz and proceeded to McAllen. (2T. 237.)

U.S. Customs pilot Louis L. Picciano explained "pitch", "adjusting an airplane's pitch" and "the trim wheel." He testified that if the second compartment (shown in Government's Exhibit 15) contained 125 pounds of material, that would cause a pilot to adjust his pitch. As the pilot would start feeling pressure during takeoff, he would reach down and start the forward trim. "It should get your attention without a doubt." (2T. 276-283.) He also described the plane's center of gravity (CG). He described trimming as "Just something you do by instinct, experience and feel. ***** It is instinct. When you take off, you run it forward and pull it back in take off position." (2T. 286-288.) As an

experienced pilot, trimming TG-BEQ would have "instinctively" come to petitioner. "It wouldn't be something that he would be thinking about." (2T. 302-303.) 125 pounds of cocaine on "a hypothetical 185 like the BEQ..."is not much weight. Just where it is sitting." (2T. 306-307.) "There is no plane you take off... the ground that you are not going to retrim. You have got to retrim." (2T. 294, lines 11-13.) Pilot Picciano continued (2T. 288-289, line 7; and 308-309, line 2):

> "Q. Take off. And have you ever moved the trim when you are taking off in any of those planes?
>
> A. Yes, sir.
>
> Q. Does that tell you that you need to stop the plane and get out and go check to see what's in the back end, to see what's in the back end of that plane?
>
> A. No. Normally it is a fine adjustment after takeoff. You may not have had it just right, or you don't know the CG of the aircraft.

Just go and fly it. You make a minor adjustment.

Q. CG refers to what?

A. Center of gravity.

Q. When you are flying planes that you have never been in before, do you personally do a thorough search of it to make sure there is nothing illegal contained in the plane?

A. No.

Q. Do you know any pilot that does do that when he is getting in a plane for the first time, that it is not his plane and is somebody else's plane?

A. Only pilots I know are either police officers or ex-military. No, we never looked in the plane so to speak if there is anything back there.

Q. You just assumed there was nothing back there, right?

A. True."

*****

"Q. If one of you eight fellows who work in this particular South Texas area that we just discussed do not have prior information on a plane coming in, how easy would it be for a 185 Cessna like BEQ to fly in over a

country area between Mission and over to Rio Grande City, over that rural area, land, drop its load of 125 pounds of cocaine and get back up in the air and get back to Mexico without being caught?

A. Got 99 percent chance of success.

Q. Ninety-nine percent chance of success?

A. Chance of success."

U.S. Customs air officer Thomas J. DeMichelle testified that when he first went out to the plane after the dog search, he did not see any contraband in open view. (2T. 346.) DeMichelle did not find any weapon on the plane. (2T. 350.)

DEA special agent Mario Luis Alvarez testified that the value of this lawsuit's cocaine would be approximately thirty million dollars. Agent Alvarez has worked for DEA in Columbia and Aruba. A lot of the cocaine coming into the U.S. is coming from Columbia, Bolivia and Peru. "A bad

person" could buy 50 kilos of cocaine in one of those "source countries" for around $10,000 a kilo, buying such volume at wholesale. Thus, this lawsuit's 50 kilos would have cost someone down there $500,000. (2T. 371-373.) His cross-examination by petitioner's counsel concluded (2T. 387, lines 13-23):

> "Q. Isn't it true on the 21st of January that you did learn that Robert Gonzalez wanted to fly the plane up to Houston, Texas, to finish the trip so you police officers could catch the bad guys involved in this case?
>
> A. That is correct.
>
> Q. And he wanted to do that with DEA officers in his plane so he couldn't run away with the dope as you understand the proposition, is that right?
>
> A. Well, that is correct. But it was impossible to do it.
>
> MR. CONNORS: Pass the witness, Your Honor."

The government rested. (2T. 390.)

Petitioner testified in his own defense. (3T. 486-559.) On cross-examination petitioner testified he could not smell any odor of anything coming from the back compartment. (3T. 596.) Petitioner did not even know of the existence of a back compartment. (3T. 597.) Petitioner did not believe that Victor set him up. Petitioner was sure Victor did not know the cocaine was in the plane. The only way anybody could have discovered the cocaine other than by taking the plane apart was getting out a sniffer dog. (4T. 636-637.)

ARGUMENTS FOR GRANTING WRIT

REASONS FOR REVIEWING FIRST QUESTION

In the case at bar the trial court's prompt curative instruction was inadequate and the requested mistrial should have

been granted. Reversal should follow since petitioner's counsel (1) timely objected to the prosecutor's prejudicial remarks; (2) the prosecutor's "outside the record" remarks were not invited by petitioner's counsel's "inside the record" arguments to the jury; (3) the prosecutor's improper comments of "... he is the virus that spreads it through his airplanes" ***** "I thought he said he had flown several airplanes" ***** "He spreads --", were very calculated, purposeful, prejudicial and merely an extension of the prosecutor's extensive cross-examination of petitioner about numerous aircraft and flights on various planes mostly through the (narcotic world's) Golden Triangle in the Gulf of Mexico (3T. 563-570, 583-594, 603-605, 634-635); (4) with the strength of the

government's case being as weak as it was, there is no certainty of conviction without the improper statements; (5) there is not overwhelming evidence of guilt to eliminate any doubt that the prosecutor's remarks could be deemed either harmless beyond a reasonable doubt or of no prejudicial effect on the jury; and (6) after the district court denied petitioner's motion for mistrial, the prosecutor continued in the same vein but referred to future crimes to which objection was overruled by the district court. (Pet.App. 112-113.)

What was really going on here? Prosecutor Wolfe was inferring to the jury "his personal speculation on petitioner's continuous criminal smuggling activities prior to January 18, 1986." This was prosecutor Wolfe's deliberate, purposeful

and intentional means of "winning at all costs: ethics, professionalism and fairness be damned--his goal is to convict, legally or illegally." Prosecutor Wolfe's unsubstantiated but devastating unfairness needs correction for it deprived petitioner of a fair trial. The reviewer must remember what prosecutor Wolfe told all at the pre-trial conference (1T. 8):

> "MR. WOLFE: No, Your Honor. We have evidence that they entered the country on numerous occasions, but that evidence doesn't say that on the other occasions they were hauling cocaine or anything. I don't think it is evidence of other crimes. But before we get into that, the Government will approach the bench."

Nevertheless in this case, the Fifth Circuit Court's ruling that the improper prosecutorial reference to extraneous offenses at final jury argument was cured

by the trial court's prompt curative instruction conflicts in principle with United States v. Hastings, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). In Hastings, the Court of Appeals for the Seventh Circuit reversed the conviction for improper prosecutorial reference at final jury argument to the defendant's Fifth Amendment rights under Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). The court declined to rely on the harmless error doctrine, stating that application of the doctrine "would impermissibly compromise the clear constitutional violation of the defendant's Fifth Amendment rights." United States v. Hastings, supra, 461 U.S. at 504, 103 S.Ct. at 1977. There, this Court reversed noting that since Chapman v. California, 386 U.S. 18, 87 S.Ct. 824,

17 L.Ed.2d 705 (1967), the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless. United States v. Hastings, supra, 461 U.S. at 510, 103 S.Ct. at 1980. There this Court also noted that, guided by considerations of justice, the federal court's use of the supervisory powers over prosecutors are three fold: (1) to implement a remedy for violation of recognized rights; (2) to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and (3) as a remedy designed to deter illegal conduct. Id., 461 U.S. at 506, 103 S.Ct. at 1978. There, turning then to the question of whether on the whole record the error identified by the circuit

court was harmless beyond a reasonable doubt, and guided by the circuit court's own explicit statement of "the magnitude of the crimes committed and the clear evidence of guilt" this court stated:

> The question a reviewing court must ask is this: absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?

Id., 461 U.S. at 511-512, 103 S.Ct. at 1981. See also United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 1042, 84 L.Ed.2d 1 (1985). There, this Court stated that:

> Nearly a half century ago this Court counselled prosecutors "to refrain from improper methods calculated to produce a wrongful conviction . . . ." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 74 L.Ed.2d 1314 (1935). The Court made clear, however, that the adversary

> system permits the prosecutor to "prosecute with earnestness and vigor." Ibid. In other words, "while he may strike hard blows, he is not at liberty to strike foul ones." Ibid.

In petitioner's case, the circuit court found the prosecutor erred but declined to reverse since the district court gave a prompt curative instruction. (Pet.App. 34-36.) In so doing, the circuit court did not take into consideration its own explicit statements of the weakness of the evidence to support petitioner's conviction, to-wit (emphasis added and footnote omitted):

> Although this is a close case, applying the above principles convinces us that the evidence was sufficient to convict appellant.
>
> *****
>
> Although we might have reached a different result had we been the jurors in this case, the evidence was clearly sufficient for the jury to have found

> appellant guilty beyond a reasonable doubt on the substantive counts of importation of cocaine and possession of cocaine with intent to distribute it.

(Pet.App. 15 and 21.) Moreover, in this case, the circuit court also ignored the inescapable conclusion that (a) the prosecutor's improper conduct was purposefully done to influence the minds of the jury against this petitioner; and (b) this prosecutorial misconduct was in direct violation of both the district court's explicit order and that prosecutor's express agreement to abide by that order.

At the March 31, 1986 pre-trial, the trial court resolved numerous pretrial motions. Among them, the court granted petitioner's motion requesting permission to join co-defendant's pretrial and trial motions (R. 197-198) so "[a]ny decision

will adhere to the benefit of each one of the defendants." (1T. 2-3.) Petitioner's Motion For James Hearing (R. 185-189) was carried along. (1T. 4.) In his motion in limine and for notice by the government of the intention to rely upon other crimes evidence (Pet. App. 48-65), petitioner apprised the district court and the government of the many prejudicial reasons, including the applicable law, as to why the government was not to refer to prior extraneous offenses, if any, without first approaching the bench to determine their admissibility. When the trial court took up petitioner's "similar acts" motion (R. 166-173; 1T. 7-8), this colloquy occurred:

> "THE COURT: *** Motion in Limine and for notice by the Government of the intention to rely upon other crimes evidence and for a continuance until such notice is

given. Are you saying that extraneous offenses --

"MR. CONNORS: There have been some inferences that my client has come in the -- Roberto has come into the United States many times in the past. Inferences he might have been doing drugs at that time or doing dirty money, laundering money. We are not trying that lawsuit.

"THE COURT: The Government is instructed if you make any reference whatever to extraneous offenses or similar acts of conduct of any of the defendants you are to first approach the bench before you use it. Do you know of any you are going to use?

"MR. WOLFE: No, Your Honor. We have evidence that they entered the country on numerous occasions, but that evidence doesn't say that on the other occasions they were hauling cocaine or anything. I don't think it is evidence of other crimes. But before we get into that, the Government will approach the bench.

"THE COURT: That's your instruction."

When the court took up petitioner's "Motion For Discovery and Inspection" (R. 141-158; 1T. 9, lines 10-19; 12, line 25 through p. 13, line 5; p. 14, line 3-7; p.

14, line 3; p. 15, line 16), this exchange occurred:

> "THE COURT: That's granted. Motion for Discovery and Inspection. If he has opened up his file to you -- is that what you said you did?
>
> "MR. WOLFE: Yes, Your Honor.
>
> "THE COURT: Is there anything further that you need to pursue in that regard, gentlemen?
>
> "MR. CONNORS: There were some matters in here that concerned things that were not in the file. Mr. Wolfe and I during the last recess were going through some of the items.
>
> *****
>
> "THE COURT: You are not to elicit any matters entailing extraneous offenses or similar acts of conduct on these defendants or any other individual without first approaching the bench.
>
> "MR. WOLFE: I understand, Your Honor.
>
> "THE COURT: Granted to that extent.
>
> *****
>
> "THE COURT: I am simply instructing you not to make reference of extraneous offenses or similar acts of conduct on the part of these

individuals or any other individual without first approaching the bench. That's my instruction to you. Anything else?

*****

"THE COURT: We are not going to be trying another offense.

"MR. CONNORS: That's what I don't want to be doing, Your Honor.

"THE COURT: The Government has been instructed in that regard. We are going to try this case. If at any time the Government attorney feels like he is entitled to bring in similar acts or conduct of any individual, he is to first approach the bench. If you consider it to be relevant, you are to defer from going into that without first approaching the bench. You will be so instructed.

"MR. WOLFE: Yes, Your Honor."

After all that precautionary pretrial work by the district court and opposing counsel, during the final part of his closing argument to the jury, prosecutor Wolfe made the comments that are now challenged. (Pet.App. 110-113; 4T. 696, line 1, through 699, line 5).

REASONS FOR REVIEWING SECOND QUESTION

Appellate acceptance of the trial court's challenged jury instructions would make it impossible for a defendant, in a case such as this, to effectively controvert one of the essential elements of the crime. The due process implications are apparent. Indeed, in this case the trial court also refused to give petitioner's timely filed requested written instruction No. 15, which read (R. 60; 4T. 724, lines 3-11):

> "If the defendant was ignorant of the fact that cocaine was in the plane in question, ignorance of that fact goes to the heart of both the defendant's denial of specific intent and the defendant's assertion that he was merely present but not involved in the offenses charged. If you find that the defendant had no knowledge that the plane contained cocaine, or if you have a reasonable doubt thereof, then you the jury must say Not Guilty by your verdict."

See also United States v. Escobar De Bright, 742 F.2d 1196 (9th Cir. 1984).

The way the court's instructions came down, the trial court mentioned that "Count No. 4 alleges the knowing and intentional possession" (4T. 707, lines 15-16) so "Before you can find the defendant guilty of Count No. 4 you must be satisfied from the evidence beyond a reasonable doubt that the defendant knowingly and willfully possessed the cocaine as charged." (4T. 708, lines 7-10.) But then the court erroneously instructed the jury that the jury could infer the possession element if one has control over a plane. (4T. 715-717.) On the facts of this case at bar, such an instruction amounted to a directed verdict on the defense of lack of knowledge that cocaine was aboard the plane petitioner

possessed. See United States v. Musgrave, 444 F.2d 755, 764-765 (5th Cir. 1971). Thus, the trial court committed reversible error by (1) removing lack of knowledge as a defense to the Counts 2 and 4 charges, (for if petitioner was driving, the jury could infer he possessed "it" PLUS if he possessed "it," he illegally imported "it"); (2) directing a verdict on the "lack of knowledge fact" issue that was for the jury to decide;[3] and (3) by instructing the jury, it can infer knowledge of the possession from the mere

---

[3] It is reversible error for the trial court to opine in its jury instruction as to the defendant's guilt beyond a reasonable doubt when "willfulness", an essential element of the statutory offense, had not been admitted. United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933) [where the trial court also improperly refused to instruct on a requested instruction as to defendant's good faith and actual belief].

fact of "being the pilot" when this testifying petitioner's sole defense was his good faith lack of knowledge that the plane was possessing contraband.

Although these objections were not made in the trial court, "they come within the purview of the plain error rule, Fed. R. Crim. P. 52(b)." United States v. Musgrave, 444 F.2d 755, 761-763 (5th Cir. 1971) [where the Court set out the law applicable also to the unique facts of this petitioner's case]. Plain error was committed when the trial court's instructions removed from the jury's consideration mistake of fact--ignorance of cocaine aboard--as petitioner's defense before the jury could convict on Counts 2 and 4. Griego v. United States, 298 F.2d 845, 847-849 (10th Cir. 1962). On this case's facts, the erroneous instruction was not

harmless beyond a reasonable doubt. Reversal must result. See and compare Vaccaro v. United States, 461 F.2d 626, 638-640 (5th Cir. 1972).

The circuit court concluded that the district court's instructions to the jury that "... you can infer a person has possession over something [the contraband] if ... he is the driver of a vehicle or pilot of a plane or the like" (emphasis added), did not improperly direct a verdict against petitioner on the issue of whether he knowingly possessed the contraband. As applied to the circumstances of this case, that appellate court's conclusion conflicts in principle with the Due Process Clause, and Francis v. Franklin, 471 U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). In Franklin, this

Court said that "A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." Id., at 105 S.Ct. 1971. See also Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969).

Of course, this case involves neither a statutory presumption nor a mandatory presumption. It involves a permissible inference. That is why the circuit court rejected it offhand. The circuit court stated that since the jury could have accepted or rejected the inference that appellant's control over the airplane constituted possession of cocaine, the district court did not improperly direct a verdict against petitioner on the issue of whether petitioner knowingly possessed

cocaine. (Pet.App. 28-30.) By so concluding, however, the circuit court ignored the fact that "knowledge" of the existence of the contraband aboard the plane was the dispositive issue in this case, not whether petitioner merely possessed the contraband by the mere fact of being the airplane's pilot. The circuit court also ignored the fact that although perhaps a correct statement of the appellate test for sufficiency of the evidence, the challenged jury instruction is not one that reason and common sense justify in light of the proven facts before this jury. See Reasons For Review of Fourth and Fifth Questions Presented. Moreover, the circuit court below has also suggested "guilty knowledge" is not proved beyond a reasonable doubt from one merely being a paid driver of a vehicle laden

with millions of dollars worth of a controlled substance in a compartment which is not visible or readily accessible to the driver. See United States v. Del Alguila-Reyes, 722 F.2d 155, 157 (5th Cir. 1983); United States v. Ledesma-Hernandez, 729 F.2d 310, 314 (5th Cir. 1984). The circuit court also ignored the trial court's instructions that

> "[t]he charge of the Court is the law by which you will be governed in your deliberations. ***** You as jurors are Judges of the facts. But in determining what happened in this case, on ther (sic) words, in reaching your decision as to the facts, it is your sworn duty to follow the law that I am about now to define to you. ***** It is your duty to apply the law as I give it to you regardless of the consequences."

(4T. 699, lines 1-3, 7-11 & 22-24.) Thus, reason and common sense do not justify the

suggested conclusion and petitioner's Due Process rights were violated.

Based on the facts of this case, the trial court's instructions denied petitioner the right to contest that knowledge element of the contraband being in the airplane and earn an acquittal. How? As to Count 2, the trial court instructed that for a person to be guilty of importing cocaine into the U.S., he must have either actual or constructive possession. As to Counts 2 and 4, those instructions included:

> "Well, in order for a person to import he has to be guilty of possession. (4T. 709.) ***** You can also infer the matter of the element of possession from the fact that an individual has control over, let us say, a vessel or a plane or a car or a house. But in order for you to find that a person has either actual or constructive possession-- ***** ...you can infer a person has possession over something he has possession over something if he has control over it. For example, he is

the driver of a vehicle or pilot of a plane or the like. But do not forget that before you can find a person guilty of having something in his possession you must also be satisfied from the evidence beyond a reasonable doubt that the person knowingly and willfully had control over the matter. Please don't forget that. The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint. You may find that the element of possession as that term is used in these instructions is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others." (4T. 715 to 717, line 4.)

REASONS FOR REVIEWING THIRD QUESTION

The circuit court held that petitioner, by agreeing to the amendment of the indictment "if it could legally be done," effectively waived prosecution by indictment and that the amended indictment thus constituted a valid information under which petitioner was prosecuted. These

holdings (1) are contrary to the facts of this case which clearly show that petitioner was prosecuted on an indictment; (2) fails to recognize that petitioner's waiver was conditioned by the statement "if it could legally be done"; and (3) are conflicting in principle with United States v. Norris, 281 U.S. 619, 50 S.Ct. 424, 74 L.Ed. 1076 (1930) and United States v. Miller, 471 U.S. ___, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985). In Miller, this Court held that the indictment requirement is violated where (1) the defendant's conviction is based upon allegations not charged in the indictment; or (2) where the prosecutor amends the indictment altering or adding an essential allegation of the crime charged. The facts of this case clearly show that petitioner was tried on an indictment by a

grand jury. (R. 5-6.) In his opening remarks to the petit jury, the prosecutor said (1R. 37, lines 22-23): "The two defendants are being charged in four counts of the indictment." Moreover, the parties' agreement "to amend an indictment if it could legally be done,"[4] cannot create subject matter jurisdiction for the district court, since petitioner did not knowingly and intelligently waive prosecution by indictment. There was not substantial compliance with Fed.R.Cr.P. 7. Thus, the magistrate should not

---

[4] A review of the tape recording of the February 20, 1986 arraignment hearing before the U.S. Magistrate will demonstrate that the trial officials were not "unknowingly sandbagged". Petitioner's trial counsel pointed out that it was okay to so amend the indictment if it could legally be done. At that time, neither petitioner nor his counsel were aware of the legal impossibilities to making such an amendment valid.

have permitted the prosecutor to amend count 2 of this indictment by AUSA R. Guerra's crossing out the word "marihuana" and replacing it with the word "cocaine". (R. 5, 201; see docket entry for 2/20/86.) Without resubmission to a grand jury, this petitioner was tried and convicted of cocaine importation which is a crime other than the marihuana importation crime alleged in the indictment's count 2. Thus, petitioner was tried for and convicted of the amended count 2 not charged against him by the grand jury. That was a violation of his Fifth Amendment right to be tried only on charges in an indictment. The concept of harmless error is not applicable. See Stirone v. United States, 361 U.S. 212, 216-219, 80 S.Ct. 270, 27 2-274, 4 L.Ed.2d 252 (1960); United States v. Carroll, 582

F.2d 942, 943-945 (5th Cir. 1978) [where the Court reversed since plain error resulted from the trial court's sua sponte amendment of the conspiracy count in the court's charge to the Jury]; United States v. Stewart Clinical Laboratory, Inc., 652 F.2d 804, 807 (9th Cir. 1981) [where the Court reversed, holding that since the defendants were convicted of an offense not charged in the indictment, there was a fatal variance between the facts alleged in the indictment and the evidence produced at trial]; and United States v. Consolidated Launderies Corp., 291 F.2d 563 (9th Cir. 1961) [where the Court reversed as to one defendant because the substitution was more than "one of form only" when there was an amendment and insertion of a comma to the indictment, which "actually substituted as a defendant

a 1951 corporation for a dissolved 1941 corporation"]. Cf. United States v Ramirez, 670 F.2d 27 (5th Cir. 1982); United States v. Musgrave, 483 F.2d 327, 338-339 (5th Cir. 1973), cert. denied, 414 U.S. 1023, 94 S.Ct. 447, 450, 38 L.Ed.2d 315 (1973).

REASONS FOR REVIEWING FOURTH QUESTION

The circuit court erred in its sufficiency analysis by misconceiving as important the "trim evidence". In summarizing the evidence in this case, the circuit court incorrectly relied on and took out of context the emphasized statements in its following paragraph (Pet. App. 10-11)(emphasis added):

> Appellant and his brother were tried before a jury. As both sides concede on appeal, the principal issue in the case was whether appellant had knowledge that the cocaine was in the

concealed compartment. It was undisputed that the cocaine was not visible to the pilot, and that it did not emit an odor that was discernable to humans. The only evidence connecting appellant with the cocaine was the effect that the presence of that much cocaine in the storage compartment would have on the pitch of the airplane. The compartment in which the cocaine was found was a baggage compartment designed to hold 50 pounds. As stated above, the gross weight of the cocaine was 125 pounds, thus overloading the baggage compartment by 75 pounds. The government put on Louis L. Picciano, an experienced customs pilot, as an expert witness. He testified in response to a hypothetical question that the amount of cocaine loaded in the airplane in question would require the pilot on take-off to adjust the trim of the airplane to compensate for the added weight in the tail of the plane. Hence, Picciano testified, the added weight would definitely call a pilot's attention to the fact that there was something in the rear baggage compartment.

This inaccuracy in the circuit court's factual conclusions is shown by a

full review of the "trim" testimony of the Government's own trial expert. Pilot Picciano testified (1T. 294, lines 11-16):

> "A There is no airplane you take off -- once you set take-off trim, as soon as you get off the ground that you are not going to retrim. You have got to retrim.
>
> Q You have got to?
>
> A Everything is going to take effect on you. Wind, temperature, everything."

In its opening statement, the Government did not even mention "trim" as a circumstance upon which the Government would rely as evidence to support appellant's knowledge of the contraband in the airplane. (1T. 36-42.) "Trim" was testified to by three expert pilots. (For their "trim" testimony, see 2T. 278-294, 296, 302-303; 3T. 437-439, 441-452, 460-464, 473-476, 480-484, 511-514, 534, 546, 600; and 4T. 601-603.)

The Government agreed in its opening final argument that "This whole case boils down to one thing: Knowledge. That's what you are going to decide when you go to the jury room." (4T. 655.)

In final arguments, counsel for petitioner referred to the "trim" evidence and stated that (4T. 680-681):

> "Trimming was so important in this lawsuit. Remember. The man would have to know he is trimming a whole lot and that would tell him there was stuff in the back. How many pilots you heard from that would tell you that ain't true? Yet, that was their lawsuit at first. Switched it now. That was their lawsuit. Would have to know it was heavy in the back because it was 75 pounds overweight. And each pilot said it is an instinct matter. Just turn it a little bit. We will abandon that theory of our lawsuit. We will move on to something else."

Responding during final argument, the Government's prosecutor disclaimed any reliance for conviction on the "trim"

evidence. There that prosecutor said (4T. 688-689):

> "Mr. Connors pointed up about the trim. Let me tell you as a prosecutor, ladies and gentlemen, I have to anticipate what a defense might be. I don't think trim had anything to do with it but I knew Mr. Connors did. So I brought in a witness about trim. I'll tell you why trim didn't have anything to do with it because he knew it was there all the time."

In the context of this lawsuit's evidence, both parties' counsel agreed that trim was not a factor. Thus from that "trim evidence" neither the jury nor a reviewing court could conclude beyond a reasonable doubt that petitioner knew or should have known that the plane was carrying contraband. The circuit court and the jury erred in doing so.

Petitioner would point out that the Government's evidence merely showed that 125 pounds in the general baggage area

where the cocaine was found would cause a pilot to adjust the pitch. (2T. 280-282.) Additionally, the evidence showed the airplane in question to be a four-seater (3T. 462-463) and that petitioner performed "touch and goes" with his brothers Victor and Carlos, before embarking on his trip with Carlos to the United States. (3T. 509-511.) Thus, while it is true that the testimony showed that the 125 pounds of cocaine in the plane would have affected the trim, that same evidence was to the effect that the trim must be adjusted on every take-off and that every experienced pilot (like petitioner) does so instinctively without thinking. (2T. 302-303.) Moreover, 125 pounds "is not much weight" in an airplane like that petitioner was flying. (2T. 307.) To further assist the Court

herein, the summarized testimony of long-time commercial pilot and instructor Creighton Domina follows.

The Cocaine's Weight Was Unnoticeable:

Creighton Domina worked for the past 26 years for McCreery Aviation in McAllen, Texas at the Miller International Airport. Domina had been a commercial pilot since 1939. He was also an instructor. (3T. 435.) Domina had been out to see the airplane depicted in Government's Exhibit No. (hereinafter GE#) 3 and Defense Exhibits Nos. (DE#) 11, 12 and 13. That that plane had a STOL kit installed "So you have flaps the whole length of the wing which increases the lift terrifically." (3T. 437.) Domina had between 18,000 and 20,000 hours flying as a pilot. (3T. 441.) As depicted in DE# 38, the elevator trim adjusts the nose,

and the rudder trim adjusts the rudder pressure. The engine pulls to the left on take off, so that is why there is a rudder trim. It is "The control on the tailend in an airplane." The trim is the wheel that when rolled forward, it puts the nose down, and when rolled back the nose goes up. (3T. 442-443.) The tailend of the airplane depicted in DE# 13 shows the elevators and the horizontal stabilizer. The front part is called the horizontal stabilizer. The back part is called the elevators. The elevators are controlled by the steering wheel. The trim raises the stabilizer. It corrects for any change of weight in the aircraft. (3T. 444-445.) Domina testified that assuming the back cargo area of the plane was supposed to handle up to 50 pounds of baggage in Baggage Compartment 2, but that

on the day in question Baggage Compartment 2 contained 125 pounds of items, that section would have been overweight by 75 pounds. Domina would not consider 75 pounds overweight at that location to make a great deal of difference, "where you would even notice it." It would make a considerable difference if you brought that weight clear back to the tail. But back where counsel told him it was, it would not be noticeable. "... [I]f you did notice a little bit of tail heaviness, you would just naturally reach down and get this wheel and give it a turn of -- maybe a quarter of a turn." (3T. 445-446.) "... [Y]ou wouldn't think anything about it. You might think maybe the trim was misadjusted or something." It would not raise a flag in his mind that something was there. An experienced

pilot would automatically reach down and turn the trim. (3T. 447-448.) Domina assumed further that the same pilot had been doing touch and goes down in Guatemala with Baggage Compartment 2 overweight by 75 pounds two days prior to the date the police found the cocaine. Domina would assume that the pilot would have found out where the trim was on that airplane. "The first-take off, if he had to readjust the trim, after he set it, I would assume that he would notice where it was. And any other take-off after that that is where he puts it, for every take-off. And there would be no other adjustments needed." Two days later when he takes off on his trip from Guatemala to Veracruz and on into McAllen Airport, Domina would not think it would go through his mind that something was wrong in the

plane. "The position of the trim took care of the situation. I wouldn't normally think anymore about it. That was where I put the trim for take-off from now on." To make sure the plane is airworthy, Domina would (3T. 450):

> "... make a pre-flight inspection of the aircraft. That's normal procedure. You walk around the airplane and you check everything there is to be checked, such as you check to see if all the controls are working properly and all the bolts are in it. You check the engine and the oil. You check -- if you are going to make a long flight, you are going to get up and check your fuel. Not only by the gauges but by looking in the tank, if you want them full. And you make a complete walk around the airplane and check all the control system to make sure everything is working. And then get in the airplane, crank it up and go."

Domina would not take off any panels off to check what is stored in the back luggage compartment that is hidden away by a panel that is screwed in. Normally,

Domina does not check the back end. (3T. 451.) Domina would not do it himself, but an experienced pilot could land and drop whatever they had and then come back to Customs and go through Customs and then later go back over there and pick it up. "Very easily." Domina had just noticed a brand new panel strip west of Mission. "There are plenty of places." (3T. 554.) There being too many places where a pilot who knew there was contraband in the plane flying into the United States could land, Domina could not see why anybody would go right over to Customs and check for clearance. (3T. 455.)

On cross-examination, Domina stated that regardless whether storage compartment 2 was rated for 50 pounds, the weight in there is what affects the pitch. If you put 50 pounds in there, or 125

pounds, you are going to have to adjust the pitch. "That also is taking into consideration you have got two 180 pound people in the back seat, too. If you don't have 180 pound people in the back seat, you could carry a little extra back there." Whether you know about it or not, when you take off you are going to feel the weight and make adjustments if it is enough to amount to anything. (3T. 462-463.) Even when you are in flight after having taken off, you might have to adjust the trim. (3T. 474.)

On redirect examination, Domina testified that based on the hypothetical where the man was doing touch and goes two days before he flew into the United States, if there were the pilot and two passengers, one sitting in the back seat, the trim would have to be adjusted. Thus,

the pilot would have to make a slight change in the trim when getting airborne without the third person in the back seat. (3T. 480-481.) With the hypothetical, one little movement of the trim wheel would probably take care of 75 pounds overweight in the back end. "It is very sensitive." He would only have to move the trim "very, very little" to compensate for the weight. (3T. 483.)

REASONS FOR REVIEWING FIFTH QUESTION

The circuit court's finding that the evidence is sufficient to support petitioner's conviction, but characterizing the evidence as "this is a close case" and "we might have reached a different result had we been the jurors in this case," conflicts in principle with Glasser v. United States, 315 U.S. 60, 62

S.Ct. 457, 86 L.Ed. 680 (1942), In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), and Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

In this case, the circuit court, believing that a verdict of not guilty would have been the result had the circuit court judges been the jurors in this case, nevertheless let stand petitioner's conviction. Despite its expressed belief that the government had failed to carry its burden of proof, the circuit court affirmed petitioner's conviction on possible jury conclusions as to certain facts (1) which do not amount to proof beyond a reasonable doubt of every element of any of the four offenses for which petitioner stands convicted; and (2) which permit pro and con speculation that

petitioner was aware that the plane was loaded. Under such circumstances, the definition of "beyond a reasonable doubt" and the central purposes it serves should mandate an appellate judgment of acquittal.

In a drug conspiracy, the Government must prove these essential elements beyond a reasonable doubt: (1) an agreement between two or more persons to commit the alleged underlying substantive drug offense; (2) that the accused conspirator knew of the alleged conspiracy; (3) that that accused had the deliberate, knowing, and specific intent to join the conspiracy; and (4) that that accused knowingly and voluntarily joined that conspiracy. United States v. Williams-Hendricks, 805 F.2d 496 (5th Cir. 1986)

Petitioner's innocence or his guilt seems equally plausible from the evidence. The circuit court has said that it will not "lightly infer a defendant's knowledge and acquiescence in a conspiracy." United States v. Jackson, 700 F.2d 181, 185 (5th Cir. 1983), cert. denied, 464 U.S. 842, 104 S.Ct. 139, 78 L.Ed.2d 132 (1983). Presence preceding and at the time of the arrest has never been sufficient on appeal to sustain a conspiracy conviction. United States v. Littrell, 574 F.2d 828, 833, 834 (5th Cir. 1978).

In order for sufficient evidence to support a conviction for possessing cocaine with intent to distribute it, the evidence must show beyond a reasonable doubt the accused's (1) knowing (2) possession of cocaine (3) with intent to

distribute it. United States v. Williams-Hendricks, supra.

When measured against these standards, the evidence presented at petitioner's trial is not sufficient to support his substantive convictions either as a principal or as an aider and abettor. Absent evidence that petitioner actually knew there was cocaine in the airplane, a reasonably minded jury should have had a reasonable doubt as to the existence of petitioner's "knowing exercise of, or the knowing power or right to exercise, dominion and control over the proscribed substance." United States v. Stephenson, 474 F.2d 1353, 1355 (5th Cir. 1973); United States v. Glasgow, 658 F.2d 1036 (5 Cir. 1981). In short, there was no proof that this petitioner had knowing possession, actual or constructive. See

also United States v. Jackson, 526 F.2d 1236, 1237 (5th Cir. 1976) [where the Court reversed because "... there is no evidence that he [Jackson] exercised any measure of dominion or control over the contraband"].

It was unreasonable for the jury to infer that petitioner had knowing and willful possession of the cocaine because the evidence, viewed in the light most favorable to the Government, does not show that petitioner knew that anything was hidden behind the back wall of the passenger compartment. From the evidence before the jury, it is entirely possible that even though he was the pilot (1T. 163), petitioner did not know that cocaine was in the airplane. Petitioner's fingerprints did not match any of the prints developed on the packages of

cocaine. Being the unknowing pilot of a hidden odorless cargo, just ain't enough to satisfy the government's constitutional burden for sustaining convictions. Accordingly, petitioner's substantive Counts 2 and 4 convictions should be reversed and acquittals ordered. The verdict of the jury in this case is in direct conflict with what the Supreme Court said in Jackson v. Virginia, supra, 443 U.S., at 320, 99 S.Ct. at 2789:

> Any evidence that is relevant--that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed.Rule Evid. 401--could be deemed a "mere modicum." But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt.

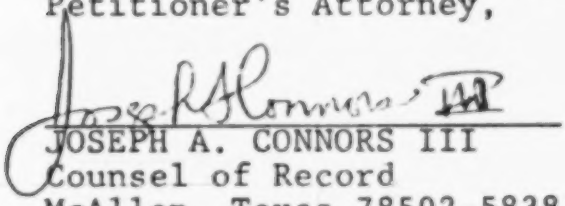
CONCLUSION

For those reasons, Gonzalez respectfully suggests that the questions

presented previously to the circuit court are ripe for resolution by this Court. Of course, this Court may wish to grant certiorari here in light of the significant impact Gonzalez' questions will have on all lower federal courts. Here this Court could resolve, once and for all, this case's trial and appellate issues. Those issues are of crucial importance. This Nation is trying to not lose its War on Drugs. That War is ultimately being waged, in courtrooms throughout this country, when prosecutors attempt to properly obtain convictions and long sentences for serious traffickers. The Bench and Bar need this Court's immediate instructions on "how to do it right the first time." Gonzalez provides that teaching tool.

DATED: March 26, 1987.

Respectfully submitted by
Petitioner's Attorney,



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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

NO. _____

ROBERTO ANTONIO GONZALEZ-CALLES,

Petitioner

V. UNITED STATES OF AMERICA,

Respondent

APPENDIX ATTACHED TO PETITION FOR

WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

RELEVANT CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

The Constitution's Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

28 U.S.C. 1254(1) provides in part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> > (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ....
> > (June 25, 1948, C. 646, 62 Stat. 928.)

28 U.S.C. 1291 provides:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.
> (As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

18 U.S.C. 3231 provides in part:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
> (June 25, 1948, C. 645, 62 Stat. 826.)

18 U.S.C. 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by

him or another would be an offense against the United States, is punishable as a principal.
(June 25, 1948, ch 645, § 1, 62 Stat. 684; as amended Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 717.)

21 U.S.C. 812 provides schedules of controlled substances as follows:

Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970 and shall be updated and republished on an annual basis thereafter.

*****

Initial schedules of controlled substances

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

*****

Schedule II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis: ...

> (4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves (including cocaine and ecgonine and their salts, isomers, derivatives), and salts of isomers and derivatives, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(Pub.L. 91-513, Title II, § 202, Oct. 27, 1970, 84 Stat. 1247; Pub.L. 95-633, Title I, § 103, Nov. 10, 1978, 92 Stat. 3772; Pub.L. 98-473, Title II, §§ 507(c), 509(b), Oct. 12, 1984, 98 Stat. 2071, 2072.)

21 U.S.C. 841 provides (footnote omitted):

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; ....

Penalties

(b) Except as otherwise provided in section 845 or 845a of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug other than a narcotic drug consisting of—

(I) coca leaves;

(II) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

(III) a substance chemically identical thereto;

(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

(iii) 500 grams or more of phencyclidine (PCP); or

(iv) 5 grams or more of lysergic acid diethylamide (LSD);

such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both

(B) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A) and (C), such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than

$125,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $250,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

*****

(c) Special parole term

A special parole term imposed under this section or section 845 or 845a of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was

spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 or 845a of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

(Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, §§ 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2068, 2070.)

21 U.S.C. 846 provides:

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the minimum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.
(Pub. L. 91-513, Title II, § 405A, as added Pub. L. 98-473, Title II, § 503(a), Oct. 12, 1984, 98 Stat. 2069.)

21 U.S.C. 952. Importation of controlled substances

Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, ...

(Pub.L. 91-513, Title III, § 1002, Oct. 27, 1970, 84 Stat. 1285; Pub.L. 95-633, Title I, § 105, Nov. 10, 1978, 92 Stat. 3772; Pub.L. 98-473, Title II, §§ 519-521; Oct. 12, 1984, 98 Stat. 2075.)

21 U.S.C. 960. Prohibited acts A

Unlawful acts

(a) Any person who—

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substances, ...

shall be punished as provided in subsection (b) of this section.

Penalties

(b)(1) In the case of a violation under subsection (a) of this section involving—

*****

(B) a kilogram or more of any other narcotic drug in schedule I or II;

*****

the person committing such violation shall be imprisoned for not more than twenty years, or fined not more than $250,000, or both.

(2) In the case of a violation under subsection (a) of this section with respect to a controlled substance in schedule I or II, the person committing such violation shall, except as provided in paragraphs (1) and (3), be imprisoned not more than fifteen years, or fined not more than $125,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

(Pub.L. 91-513, Title III, § 1010, Oct. 27, 1970, 84 Stat. 1290; Pub.L. 98-473, Title II, § 504, Oct. 12, 1984, 98 Stat. 2070.)

21 U.S.C. 963. Attempt and conspiracy

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.
>
> (Pub. L. 91-513, Title III, § 1013, Oct. 27, 1970, 84 Stat. 1291.)

28 U.S.C. 2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect substantial rights of the parties.
> (May 24, 1949, C. 139, § 110, 63 Stat. 105.)

Fed.R.Cr.Proc. 52 provides:

> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

BRF124

86-1580

NO. _____

Supreme Court, U.S.
FILED
MAR 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

ROBERTO ANTONIO GONZALEZ-CALLES,

Petitioner

V.

UNITED STATES OF AMERICA,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEY FOR PETITIONER

BRF124

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TABLE OF CONTENTS TO APPENDIX
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	Page
TABLE OF CONTENTS	2
ORDER DENYING REHEARING	3
CIRCUIT COURT'S JUDGMENT	4
CIRCUIT COURT'S OPINION	5
DISTRICT COURT'S JUDGMENT	41
INDICTMENT	44
ALL DEFENDANTS' MOTION IN LIMINE AND FOR NOTICE BY THE GOVERNMENT OF THE INTENTION TO RELY UPON OTHER CRIMES EVIDENCE AND FOR A CONTINUANCE UNTIL SUCH NOTICE IS GIVEN WITH SUPPORTING MEMORANDUM ...	48
DISTRICT COURT'S ENTIRE FINAL CHARGE TO THE JURY	66
RELEVANT JURY ARGUMENT	109

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-2389

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERTO ANTONIO GONZALEZ-CALLES,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING
(January 26, 1987)

Before BROWN, RANDALL and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen Randall
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2389

D.C. Docket No. CR-B-86-049

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERTO ANTONIO GONZALEZ-CALLES,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before BROWN, RANDALL, and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

December 17, 1986

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-2389

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERTO ANTONIO GONZALEZ-CALLES,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas
(D. C. No. CR-B-86-049)

(December 17, 1986)

Before BROWN, RANDALL and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:*

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Roberto Antonio Gonzalez-Calles ("appellant") appeals his conviction for importation of cocaine and possession of cocaine with intent to distribute it and for conspiracy to import and possess cocaine with intent to distribute it. For the reasons that follow, we affirm.

I.

On January 18, 1986, shortly after 5:00 p.m., appellant and his brother arrived at the public airport in McAllen, Texas aboard a 1972 Cessna Skywagon Model 185, a single-engine airplane. Appellant was the pilot of the plane, and his brother was a passenger. Appellant and his brother disembarked, and brought their luggage to customs for inspection. They made a negative declaration, claiming that they were not bringing anything into the United States.

While appellant and his brother were in the customs office, customs agent Louis D. Hall boarded the plane with his dog, Royker, which was trained to detect narcotics, to conduct a search of the plane. Royker indicated that drugs were present in the plane, and customs agents Andreas Funk and Thomas J. DeMichelle entered the plane to search it. After determining that no contraband was visible, agent DeMichelle noticed a hole in the rear bulkhead of the plane. Upon enlarging the hole and shining a flashlight inside, the agents were able to see plastic bags in the compartment behind the bulkhead. A knife was inserted into the hole, and a white powder was on the knife when it was withdrawn. This powder field tested positive for the presence of cocaine. The agents then removed the screws securing the bulkhead and discovered three large plastic bags, weighing approximately 125

pounds, and containing approximately 110 pounds net weight of cocaine. The bags were tested for fingerprints, and some were obtained, but these did not match the fingerprints of either appellant or his brother.

After the discovery of the cocaine, appellant and his brother were arrested and advised of their Miranda rights. Appellant made statements to the effect that he did not know that the cocaine was in the airplane. Appellant claimed that the airplane belonged to Victor, another of his brothers, who intended to sell it, and that he was taking it to Hobby airport in Houston for repairs. Appellant had letters in his possession authorizing him to take the airplane to Houston for repairs, as well as $700 in cash, supposedly for his expenses in doing so.

Appellant and his brother were indicted on four counts. Count one charged conspiracy to import cocaine, in violation of 21 U.S.C. §§ 952(a), 960 (b)(1), and 963. Count two charged importation of cocaine, in violation of 21 U.S.C. §§ 952(a) and 960(b)(1), and 18 U.S.C. §2. Count three charged conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. Count four charged possession of cocaine with intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 18 U.S.C. § 2. As returned by the grand jury, count two contained a typographical error. While count two should have charged importation of cocaine, it erroneously charged importation of marihuana. With the consent of the defendant, the word "marihuana" was deleted and the word "cocaine" was interlineated.

Appellant and his brother were tried before a jury. As both sides concede on appeal, the principal issue in the case was whether appellant had knowledge that the cocaine was in the concealed compartment. It was undisputed that the cocaine was not visible to the pilot, and that it did not emit an odor that was discernable to humans. The only evidence connecting appellant with the cocaine was the effect that the presence of that much cocaine in the storage compartment would have on the pitch of the airplane. The compartment in which the cocaine was found was a baggage compartment designed to hold 50 pounds. As stated above, the gross weight of the cocaine was 125 pounds, thus overloading the baggage compartment by 75 pounds. The government put on Louis L. Picciano, an experienced customs pilot, as an expert witness. He testified in response to a hypothetical

question that the amount of cocaine loaded in the airplane in question would require the pilot on take-off to adjust the trim of the airplane to compensate for the added weight in the tail of the plane. Hence, Picciano testified, the added weight would definitely call a pilot's attention to the fact that there was something in the rear baggage compartment.

At the close of the government's evidence, the district court granted appellant's brother's motion for a directed verdict of acquittal, but declined to grant appellant's similar motion. At the close of all of the evidence, appellant made a motion for a directed verdict of acquittal, which the district court also denied. The jury convicted appellant on all counts, and the court imposed sentence. Appellant was sentenced to ten years on each of the four counts, with the sentences to run

concurrently. At the imposition of sentence, the district court also imposed a special parole term of seven years on each of the substantive counts and an assessment of $50 on each count. Although the district court imposed the special parole term at sentencing, it was not included in the Judgment and Probation/Commitment Order signed by the district judge.

Appellant appeals to this court, alleging that a variety of errors warrant the reversal of his conviction. Specifically, appellant argues that (1) the evidence was insufficient to convict him on either the substantive counts of importation of cocaine and possession of cocaine with intent to distribute it or the conspiracy counts; (2) the conspiracy convictions should be reversed because the only other known conspirator was acquitted and there was insufficient evidence from which the

jury could have concluded that appellant conspired with unknown others; (3) the error in the indictment could not legally be corrected by amendment, and therefore there was a fatal variance between the indictment and the proof as to count two; (4) the district court erred in instructing the jury that they could infer possession from the fact that a person had control over an airplane; (5) the district court erred in failing to give an instruction on knowledge requested by appellant; (6) reversible error occurred because of references by the prosecutor in his closing arguments to other acts of the appellant; and (7) the district court erred in imposing a special parole term. We address each of appellant's arguments in turn.

II.

A. Sufficiency of the Evidence:

Appellant's major argument in seeking a reversal of his convictions is that the evidence was insufficient to support the jury finding that he knowingly possessed the cocaine. The test this court employs in assessing the sufficiency of the evidence to support a conviction is well-settled:

> It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. The jury is free to choose among reasonable constructions of the evidence.

United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc) (footnote omitted), aff'd on other grounds, 462 U.S. 356 (1983). In applying this standard, "we must examine all the evidence and reasonable inferences in the light most favorable to

the government and determine whether a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." United States v. Fortna, 796 F.2d 724, 740 (5th Cir.), cert. denied, 107 S. Ct. 437 (1986). "We recognize that possession may be actual or constructive, joint among several people and proved by circumstantial evidence." United States v. Moreno-Hinojosa, 804 F.2d 845, ____ (5th Cir. 1986). Although this is a close case, applying the above principles convinces us that the evidence was sufficient to convict appellant.

In addition to the expert testimony noted above that a pilot would definitely notice the added weight of the cocaine in the rear luggage compartment of the airplane, there was other evidence from which the jury could have found appellant guilty. There was evidence that appellant

misrepresented the numbers on his airplane when he filed his flight plan in Veracruz, Mexico.[1] Although appellant testified that the numbers that he supplied were those of another airplane that he was used to flying, the jury could easily have concluded that appellant simply lied about the airplane's numbers so as to avoid alerting United States Customs of the arrival of that particular airplane.[2] In response to questioning by the court, appellant testified that the service that was to be

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[1] The flight plan that appellant filed in Veracruz stated the registration number of the airplane as TBGAF, while the actual number painted on the airplane was TG-BEQ.

[2] Appellant testified that he was aware that the Mexican authorities would notify the McAllen airport of his arrival. Hence, the jury could well have concluded that appellant had intentionally misrepresented the registration numbers of the airplane, in order to confuse United States Customs, because he knew that the cocaine was in the airplane.

performed on the airplane in Houston could have been performed in El Salvador or Guatemala. Based upon this testimony, the jury could have concluded that appellant's story that he was delivering the airplane to Houston for pre-sale repairs and servicing was simply not credible. Furthermore, appellant arrived after 5:00 p.m., and admitted knowing that the airport customs office closed at 5:00. The jury could easily have believed the government's theory that appellant arrived after normal business hours in the hope that United States Customs would have only a reduced evening staff on duty and would therefore not search his airplane. Finally, when he was arrested, appellant had in his possession a letter from his brother, Victor, the owner of the airplane, which, in addition to giving appellant instructions as to who to deliver the airplane to in Houston and what service

the airplane needed, stated that Victor was "already on [his] way out to do some jobs of drilling for water at some town." Appellant, however, testified that Victor was with him in the morning on the day before his departure. Given this apparent inconsistency, the jury could have concluded that the letter was simply a precaution that would provide a legitimate excuse for the flight in the event that the cocaine was discovered. We conclude that the above evidence, when viewed in the light most favorable to the government, is sufficient for a jury to find appellant guilty beyond a reasonable doubt of knowingly importing cocaine and possessing cocaine with intent to distribute it.

In holding that the above evidence is sufficient to sustain appellant's conviction on the substantive possession and importation counts, we are reminded that

this court has sustained convictions in similar cases involving far less evidence to convict. See United v. Aguila-Reyes, 722 F.2d 155, 156-58 (5th Cir. 1983). In Aguila-Reyes, the defendant was the driver of a truck. The truck contained a factory-build compartment which was visible only from beneath the vehicle. Upon crossing the United States-Mexico border in Texas, a customs dog signaled the presence of narcotics. The compartment was searched by removing the front seat, a rubber mat, and a metal plate secured by screws, and cocaine was discovered. As in the case sub judice, the defendant claimed that he did not know that there was cocaine in the compartment. This court held that the jury could infer from the value of the cocaine, $5 million wholesale, that the defendant would not have been entrusted with it if he were without knowledge of its existence and

importance.[3] In Aguila-Reyes, the defendant claimed that the purpose of his trip was to pick up Toyota pick-up trucks in Miami, Florida. This court stated that the defendant must have been aware that Toyota trucks could be purchased closer than Miami, and that it was reasonable for the jury to infer that the defendant should have known that his trip "was prompted for some additional, probably illegal, reason." Id. at 157. The court also stated that a false

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[3] In the case sub judice, there was testimony that the 110 pounds of 95 percent pure cocaine had a retail value after dilution of $30 million, but a wholesale value of only $500,000. In contrast, in Aguila-Reyes, the street, or retail value of the 30 pounds of cocaine was claimed to be $20 to $40 million, and the wholesale value $5 million. The court in Aguila-Reyes stated that this inference, although permissible, would be insufficient alone to support a finding of guilty knowledge. We agree, and therefore give it little weight in our evaluation of the sufficiency of the evidence against appellant.

statement made by the defendant to customs officials could be considered by the jury in determining whether the defendant had knowledge of the presence of the cocaine.

Applying the same analysis to the case sub judice, appellant admitted to being aware that the airplane could have been serviced in El Salvador or Guatemala, which would have at least raised suspicion in his mind were he without knowledge of the real purpose of the trip. Appellant also misrepresented the registration number of the airplane to authorities in Veracruz. The defendant's conviction in Aguila-Reyes was upheld on little more evidence than this, whereas in appellant's case, there was the significant evidence that 125 pounds of cocaine in the airplane would have come to the attention of the pilot. Although we might have reached a different result had we been the jurors in this case, the evidence

was clearly sufficient for the jury to have found appellant guilty beyond a reasonable doubt on the substantive counts of importation of cocaine and possession of cocaine with intent to distribute it.[4]

B. The Conspiracy Counts:

Appellant argues that the granting by the district court of his brother's motion for a directed verdict of acquittal requires a reversal of his conviction on the

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[4] Although appellant does not attack specifically his conviction of intending to distribute the cocaine, we note that "[i]ntent to distribute a controlled substance may be inferred solely from possession of a large amount of the substance. The purity and value of the substance also are relevant to the possessor's intent to distribute." United States v. Prieto-Tejas, 779 F.2d 1098, 1101 (5th Cir. 1986) (citations omitted). Here, appellant was in possession of 110 pounds of 95 percent pure cocaine with a retail value of $30 million. The evidence amply supports a finding that if appellant possessed the cocaine, he intended to distribute it.

conspiracy counts because his brother was the only alleged known conspirator, and there was not evidence from which the jury could infer that unknown others conspired with appellant. The indictment alleged that appellant conspired with his brother and "with other persons unknown." We conclude that there was evidence from which the jury could have concluded that other persons participated in loading the cocaine into the airplane and that others would distribute the cocaine. This evidence was supplied by the appellant's own fingerprinting experts who testified that they discovered fingerprints on the bags containing the cocaine, but that these fingerprints did not match either appellant's or his brother's. Hence, the jury could logically infer that those unidentified fingerprints belonged to an unknown conspirator who loaded the bags onto the airplane. Furthermore, appellant

testified that he was going to deliver the airplane to Houston, and then proceed on a commercial airline to Florida. The jury could have inferred from this testimony that the appellant was only the pilot in the cocaine importation and distribution scheme, and that once his role was completed, others would attend to the distribution of the drug. Given this circumstantial evidence that others were involved in the scheme, we think that the jury could conclude beyond a reasonable doubt that appellant conspired to import and possess cocaine with intent to distribute it.

Appellant also argues that the evidence was insufficient to support his conviction on the conspiracy counts because it failed to prove beyond a reasonable doubt that he knew of the existence of each conspiracy and voluntarily joined and participated in them. "In drug conspiracy cases, the government

must prove beyond a reasonable doubt that a conspiracy existed, that the accused knew of the conspiracy, and that he knowingly and voluntarily joined it." United States v. Williams-Hendricks, No. 86-2070, slip op. 1181, 1187 (5th Cir. Nov. 19, 1986). The government need not prove the elements of a conspiracy by direct evidence; circumstantial evidence can be used to show the existence of a conspiracy. Id. at 1188. As we held above, there was evidence from which the jury could have concluded that others were involved in the importation and distribution of the cocaine, so the jury could have found the existence of a conspiracy. Looking at the circumstantial evidence in this case, and accepting the jury's finding that appellant knowingly imported and possessed the cocaine with the intent to distribute it, we think that the jury could have concluded beyond a

reasonable doubt that appellant knew of the conspiracy and, by his conduct in importing and possessing the cocaine, knowingly and voluntarily joined it. Hence, we conclude that the evidence was sufficient to support appellant's conviction on the conspiracy counts.

C. Amendment of the Indictment:

Appellant argues that at the time that he agreed to amend the indictment, he assumed that it could legally be done, but that he held this assumption in error. Appellant now argues that it was legally impossible to amend the indictment, and that, as a result, there was a fatal variance between the indictment and the evidence offered at trial. Under the Federal Rules of Criminal Procedure, a defendant may waive indictment in all but capital offenses. See Fed. R. Crim. P. 7(a). "An offense which may be punished by

imprisonment for a term exceeding one year may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and his rights, waives in open court prosecution by indictment." Id. 7(b). We hold that in this case appellant effectively waived indictment by agreeing to the amendment of the indictment in the proceeding before the magistrate. Had appellant insisted on resubmission of the indictment to the grand jury, he would have the right to be reindicted. Instead, appellant affirmatively waived that right, and cannot argue after conviction that the indictment was fundamentally defective. Hence, we hold that the defendant waived his right to be prosecuted by indictment and that the amended indictment constituted a valid information under which appellant was prosecuted. See id. 7(c)(1).

D. The Jury Instructions on Possession:

Appellant argues that the district court committed reversible error in instructing the jury that they could infer possession from the fact that a person is in control of a vehicle or an airplane, and that this instruction amounted to a directed verdict on appellant's defense of lack of knowledge that the cocaine was aboard the airplane. This argument fails to distinguish between a permissive inference and a mandatory presumption, and we reject it. Cf. United States v. Ferro, 709 F.2d 294, 296-97 (5th Cir. 1983) (approving instruction that the jury may infer knowledge that property is stolen and participation in the theft from unexplained possession of recently stolen property). In

this instruction,[5] the district court made it clear that the jury had to be convinced beyond a reasonable doubt that appellant knowingly and willfully possessed the cocaine. The jury was therefore free to accept or reject the inference that appellant's control over the airplane

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[5] The district court's instruction provided:

> I was telling you about possession. And I was also telling you, my recollection is, for example, you can infer a person has possession over something if he has control over it. For example, he is the driver of a vehicle or the pilot of a plane or the like. But do not forget that before you can find a person guilty of having something in his possession you must also be satisfied from the evidence beyond a reasonable doubt that the person knowingly and willfully had control over the matter....

constituted possession of the cocaine.[6] Hence, we conclude that the district court did not improperly direct a verdict against appellant on the issue of whether he knowingly possessed the cocaine.

E. Failure to Give Appellant's Requested Instruction:

Appellant argues that the district court erred in failing to grant his requested instruction that the jury must

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[6] This court has held that "[o]ne who owns or exercises dominion or control over a motor vehicle in which a contraband substance is concealed may be deemed to possess the contraband." United States v. Williams-Hendricks, No. 86-2070, slip op. 1181, 1185 (5th Cir. Nov. 19, 1986) (quoting United States v. Vergara, 687 F.2d 57, 62 (5th Cir. 1982)). Hence, we think that the district court's instruction was a correct statement of the law and that the jury could infer from the appellant's exercise of control over the airplaine that he constructively possessed the cocaine. Of course, as per the instruction, the government was also required to prove that the defendant knowingly possessed the cocaine.

return a verdict of "not guilty" if they have a reasonable doubt that appellant knew that the cocaine was aboard the plane. We think that the district court did not err in refusing to grant this instruction. The refusal by a trial judge to deliver a requested instruction constitutes reversible error only if three conditions are met:

> (1) the instruction is substantively correct;
>
> (2) it is not substantially covered in the charge actually given to the jury; and
>
> (3) it concerns an important point in the trial so that the failure to give it seriously impairs the defendant's ability to present a given defense effectively.

United States v. Hunt, 794 F.2d 1095, 1097 (5th Cir. 1986). We hold that appellant is unable to meet the second prong in the above test. The jury instructions clearly stated that the prosecution was required to prove

beyond a reasonable doubt that appellant knowingly imported the cocaine and knowingly possessed it with the intent to distribute it. Under the instructions given, if the jury had a reasonable doubt that appellant had knowledge that the cocaine was aboard the airplane, they would have had to acquit him. Hence, appellant's requested instruction would have been redundant. The district court's instructions properly placed the burden of proof on the element of knowledge on the government, and additional instructions on this issue were not required.

F. Alleged Prosecutorial Misconduct in the Closing Argument:

Appellant argues that the conduct of the prosecutor in the closing arguments constituted reversible error, and that the district court erred in failing to grant his

motion for a mistrial and in failing to sustain his objection to one of the arguments. In order to understand the basis for appellant's argument, it is necessary to digress somewhat. Prior to trial, appellant sought a motion in limine and an order for notice by the government of the intention to rely on evidence of other crimes. Appellant had made many flights into the United States, and wanted to avoid any inference that he might have been smuggling narcotics on those occasions. The district court granted the motion, and instructed the government that it could not make any reference to extraneous offenses or similar acts of appellant or his brother without first approaching the bench. In his closing argument, the prosecutor made a reference to "airplanes," arguably inviting the jury to infer that appellant brought cocaine into the United States on his numerous other

trips to this country. Appellant objected, and the district court immediately instructed the jury that they were to consider only the evidence in the case. Appellant then moved for a mistrial, which the district court denied.[7] Although we

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[7] The entire exchange is set out below:

MR. WOLFE:

.....

I will tell you right now, in this country we have got a cancer and it is called "cocaine." It might be painful for you, but you have got to go in there and you have got to take out that scalpel and you have got to cut it out. If you don't cut it out, ladies and gentlemen, it is going to grow and grow until it consumes us all. And he is the virus that spreads it through his airplanes.

MR. CONNORS: I object, Your Honor, that was in the plural. Seems to infer something about similar acts.

MR. WOLFE: I thought he said he had flown several airplanes, ladies and gentlemen.

think that this argument was improper, in that there was no evidence that appellant carried cocaine in any other airplane, we

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(continued)

MR. CONNORS: Would the Court --

MR. WOLFE: He spreads --

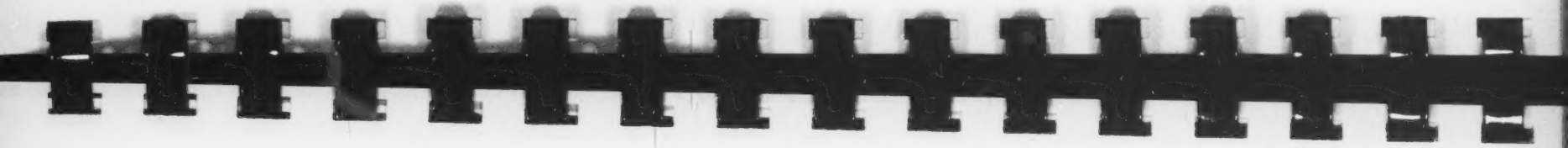
THE COURT: What is your objection, please?

MR. CONNORS: The insinuation is, he is spreading cocaine on more than one airplane, Your Honor. And he is forgetting about knowingly, but he is saying numerous airplanes.

THE COURT: If any reference is made to any matters not regarding the evidence in this case, you are to completely and totally disregard it. We are not trying anything else except what's in the indictment and what was presented to you as evidence in this case. Any reference or intimation that is made to the contrary, you are to completely and totally disregard it. Those are my instructions to you.

MR. CONNORS: Then I respectively move for a mistrial.

THE COURT: Denied.



decline to reverse in light of the district court's prompt curative instruction. See United States v. Cardenas, 778 F.2d 1127, 1132 (5th Cir. 1985); United Stated v. Frascone, 747 F.2d 953, 957-58 (5th Cir. 1984); United States v. Shackelford, 709 F.2d 911, 913-14 (5th Cir.), cert. denied, 464 U.S. 899 (1983).

Appellant also argues that the district court erred in failing to sustain his objection to the prosecutor's closing argument that if the defendant was acquitted, he would be able to make up for the loss of the airplane and the cocaine "on his next trip."[8] We think that this argument was a fair response to appellant's closing argument that the real smugglers could afford to lose the airplane and this shipment of cocaine, and that the district court was correct in overruling appellant's objection. Hence, we hold that the

[8] This argument is set out in full:

MR. WOLFE: He is spreading this virus through his airplane TG-BEQ. Fortunately we stopped him. But if you let him go, like Mr. Connors, said, he only lost $30,000 and half-a-million. And on his next trip, if he gets through, he can make it up. That's what Mr. Connors told you.

Thank you ladies and gentlemen.

MR. CONNORS: I object to the last three sentences. I never told the jury that, Your Honor.

THE COURT: Overruled.

prosecutor's closing arguments did not amount to reversible error. See United States v. Strmel, 744 F.2d 1086, 1089-90 (5th Cir. 1984).

G. The Special Parole Term:

Appellant also argues that the district court erred in imposing a special parole term at the sentencing hearing. As noted above, the special parole term, for whatever reason, was not incorporated into the final judgment of the district court. The rule in this circuit, however, is that "where there is a conflict between the oral and the written versions of a sentence, the former is controlling." United States v. Clark, 741 F.2d 699, 707 (5th Cir. 1984); see also Schurmann v. United States, 658 F.2d 389, 391 (Former 5th Cir. Unit A Oct. 1981). Turning to the special parole term, it is clear that it is not authorized by the

statutes under which appellant was convicted, see 21 U.S.C. §§ 841(b)(1)(A)(ii) and 960(b)(1)(B), and at oral argument the government stated that it did not contend that a special parole term should have been imposed. See also United States v. Santamaria, 788 F.2d 824, 829 (1st Cir. 1986) (holding special parole term not authorized under the 1984 amendments to 21 U.S.C. § 841). We agree with both the government and appellant that the special parole term was unauthorized, and hold that the special parole term is not a part of the judgment of conviction.

H. Other Arguments:

Finally, appellant argues that this court should not invoke the concurrent sentence doctrine to pretermit review of the sufficiency of the evidence issues previously discussed, and that this court

should abandon the concurrent sentence doctrine. Since this court has not invoked the concurrent sentence doctrine in this case, we decline to address these arguments.

III.

For the above reasons, we AFFIRM Gonzalez-Calles' conviction.

United States of America vs. ROBERTO ANTONIO GONZALEZ-CALLES DEFENDANT	United States District Court for the SOUTHERN DISTRICT OF TEXAS BROWNSVILLE DIVISION DOCKET NO. B-86-49-01

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date May 15, 1986

COUNSEL

X WITH COUNSEL Joseph A. Connors, III

PLEA

X NOT GUILTY on February 20, 1986.

FINDING & JUDGMENT

There being a verdict of
X GUILTY.

On April 10, 1986, to Counts 1, 2 3 and 4 Defendant has been convicted as charged of the offense of conspiracy to import a quantity of cocaine, in violation of Sections 963, 952(a), and 960(b)(1), Title 21, United States Code on Count 1; importing approximately 125 pounds of cocaine, in violation of Sections 952(a) and 960(b)(1), Title 21, and Section 2, Title 18, United States Code on Count 2; conspiracy to possess, with intent to distribute, a quantity of cocaine, in violation of Sections 846, 841(a)(1), and 841(b)(1)(A), Title

21, United States Code, on Court 3; and possess, with intent to distribute, approximately 125 pounds of cocaine, in violation of Sections 841(a)(1) and 841(b)(1)(A), Title 21, and Section 2, Title 18, United States Code on Count 4 of the Indictment. OFFENSE COMMITTED: January 18, 1986.

SENTENCE OR PROBATION ORDER

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Ten years as to Count 1; Ten years as to Count 2, to run concurrently to Count 1; ten years as to Count 3, to run concurrently to Counts 1 and 2; Ten years as to Count 4, to run concurrently to Counts 1,2, and 3.

The Court further imposes a $50.00 special monetary assessment pursuant to 18 USC 3013, as to each of Counts 1, 2, 3, and 4, for a total of $200.00.

APPROVED AS TO FORM:
/s/ Alfred Crixell

COMMITMENT RECOMMEND-ATION	The court orders commitment to the custody of the Attorney General and recommends, that the defendant be housed at the Tallahassee Federal Correctional Institute in Tallahassee, Florida.

Signed by
X U.S. District Judge:
/s/ Filemon B. Vela
Honorable
Filemon B. Vela

Date 5/26/86

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA *

vs * CR. NO. B-86-49

ROBERTO ANTONIO
GONZALEZ-CALLES *
CARLOS BENJAMIN
GONZALEZ-CALLES *

I N D I C T M E N T

THE GRAND JURY CHARGES:

COUNT 1

That from on or about January 16, 1986, to on or about January 18, 1986, within the Southern District of Texas, and elsewhere, ROBERTO ANTONIO GONZALEZ-CALLES and CARLOS BENJAMIN GONZALEZ-CALLES knowingly and intentionally did combine, conspire, confederate, and agree together and with each other and with other persons unknown to the Grand Jurors to unlawfully import into the United States from a place outside of

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the United States a quantity of cocaine, a controlled substance under Schedule II of the Controlled Substances Act of 1970, in violation of Sections 963, 952(a) and 960(b)(1), Title 21, United States Code.

COUNT 2

That on or about January 18, 1986 within the Southern District of Texas, and within the jurisdiction of this Court, ROBERTO ANTONIO GONZALEZ-CALLES and CARLOS BENJAMIN GONZALEZ-CALLES did knowingly and intentionally import into the United States from a place outside of the United States approximately 125 pounds (gross weight) of cocaine ~~marihuana~~, a controlled substance under Schedule II of the Controlled Substancs (sic) Act of 1970, contrary to Sections 952(a) and 960(b)(1), Title 21, and Section 2, Title 18, United States Code.

COUNT 3

That from on or about January 16, 1986, to on or about January 18, 1986, within the Southern District of Texas, and elsewhere, ROBERTO ANTONIO GONZALEZ-CALLES and CARLOS BENJAMIN GONZALEZ-CALLES knowingly and intentionally did combine conspire, confederate, and agree together and with each other and with other persons unknown to the Grand Jurors to unlawfully possess, with intent to distribute, a quantity of cocaine, a controlled substance under Schedule II of the Controlled Substances Act of 1970, in violation of Sections 846, 841(a)(1), and 841(b)(1)(A), Title 21, United States Code.

COUNT 4

That on or about January 18, 1986, within the Southern District of Texas, and within the jurisdiction of this Court, ROBERTO ANTONIO GONZALEZ-CALLES and CARLOS BENJAMIN GONZALEZ-CALLES did knowingly and

intentionally possess, with intent to distribute, approximately 125 pounds (gross weight) of cocaine, a controlled substance under Schedule II of the Controlled Substances Act of 1970, contrary to Sections 841(a)(1) and 841(b)(1)(A), Title 21, and Section 2, Title 18, United States Code.

A TRUE BILL:

/S/
FOREMAN OF THE GRAND JURY

HENRY K. ONCKEN
UNITED STATES ATTORNEY

/S/ Jack Wolfe
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL
	§	NO. B-86-049
ROBERTO ANTONIO	§	
GONZALEZ-CALLES	§	
CARLOS BENJAMIN	§	
GONZALEZ-CALLES	§	

ALL DEFENDANTS' MOTION IN LIMINE AND FOR NOTICE BY THE GOVERNMENT OF THE INTENTION TO RELY UPON OTHER CRIMES EVIDENCE AND FOR A CONTINUANCE UNTIL SUCH NOTICE IS GIVEN WITH SUPPORTING MEMORANDUM

TO THE HONORABLE JUDGE OF SAID COURT:

ROBERTO ANTONIO GONZALEZ-CALLES and CARLOS BENJAMIN GONZALEZ-CALLES, the accuseds herein move this Court for an order.

A. Directing the government, prior to trial, to give notice of its intention to use evidence of any accused's "other crimes, wrongs or acts" in the

trial of this case and to specify what particular accusations will be made and identifying the witnesses it intends to rely upon at trial to prove these matters.

B. To instruct the attorneys and any and all Government witnesses to refrain from mentioning, directly or indirectly, in any manner whatsoever, any extraneous offense of which this accused is not charged explicitly in the allegations of the Indictment herein, without the Government attorney first approaching the bench with this accused's attorney and obtaining a ruling from the Court, outside the presence and hearing of the Jury, in regard to any asserted theory of admissibility of any such extraneous offense(s). As a basis for this motion, this accused maintains

that to allow mentioning of any extraneous offenses without prior ruling of the Court on its admissibility would unduly prejudice the accused before the jury herein.

C. In support of said motion, this accused says:

1. In an effort to prove the elements of the offense(s) charged, the government may introduce evidence of other acts and/or wrongs aside from those alleged in the Indictment.

2. The granting of this motion for disclosure would reduce the potential of prejudice to this accused from surprise use of such uncharged evidence.

3. The granting of this pre-trial motion will also assist the court in making timely pre-trial determinations of admissibility, in avoiding the dangers

of unfair prejudice, of confusion of the issues and of misleading the jury and, finally, in minimizing undue delay, waste of time, or needless presentations of cumulative evidence during the course of the jury trial.

4. NOTICE: This accused under the Fifth and Sixth Amendments to the United States Constitution is entitled to due process and to advance notice of the charges against which he must defend himself. If, in proving those charges, the prosecution reasonably anticipates that it may be using evidence of extraneous similar acts or evidence of other crimes not in the charging instrument, then this accused will have no prior notice of them unless notice is given at this time. Further, lack of notice will constitute a denial of this accused's

constitutional right to notice under the United States Constitution.

5. EFFECTIVE ASSISTANCE OF COUNSEL: Should the prosecution be allowed to introduce evidence of other crimes or extraneous similar acts in this cause, then this court will charge the jury, by instruction, that they may not use that evidence of the extraneous similar acts unless they find the accused guilty of those offenses beyond a reasonable doubt. The effect of that instruction is to litigate that issue. In order to fairly litigate that issue, the accused must be entitled to the effective assistance of counsel in litigating that issue. The accused must reasonably be given the opportunity to persuade the jury that the accused is not guilty of the extraneous similar

acts beyond a reasonable doubt. By failing to give the accused notice of the extraneous similar acts, if any, which the prosecution reasonably may introduce in this cause, the prosecution and this court are depriving the accused, in addition to notice and due process, of the effective assistance of counsel which in (sic) his right under the Fifth and Sixth Amendments to the United States Constitution.

6. THE RIGHT TO PRESENT DEFENSIVE EVIDENCE: It is fundamental under the Sixth Amendment of the United States Constitution that the accused has the right to present defensive evidence. Chambers v. Mississippi, 404 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). When the prosecutor tries to prove the guilty of any extraneous similar acts

beyond a reasonable doubt, then under Chambers v. Mississippi, the accused would be entitled to present defensive evidence in his own behalf to show the fact finder that he is not guilty of that offense. In order to prepare and to gather that defensive evidence, this accused must have notice of that extraneous similar acts evidence in advance of trial. Deprivation of that notice would make it impossible for this accused to prepare or to present the varied defensive evidence which is his right to so do under the United States Constitution.

7. CONFRONTATION: Under the Sixth Amendment to the United States Constitution, the accused is entitled to confront and cross-examine his accusers. If the prosecution chooses to litigate the issue of the

extraneous similar acts, namely, whether the accused is guilty of similar acts offense(s) beyond a reasonable doubt, which the fact finder must find before it can use such evidence, then the accused must be able under the Sixth Amendment to intelligently confront and cross-examine the accusers on that separate charge. If the accused is given no notice of that charge, then not only is his right under the Sixth Amendment to notice denigrated as well as the effective assistance of counsel, as well as his fundamental right to present defensive evidence, but, in addition, his absolute right to confront and cross-examine his accusers is severely undercut by his lack of any opportunity to prepare for such cross-examination.

8. CONTINUANCE TO SECURE RIGHTS: If the accused is not given notice of the additional extraneous offenses which the prosecutor, in good faith, reasonably believes or intends to litigate at trial, then this accused will be forced to move this court for a continuance under the Fifth and Sixth Amendments to the United States Constitution in order to obtain both due process and notice of and defensive evidence concerning the additional unindicted charges, to secure the effective assistance of counsel in litigating the issue of this accused's guilt of the additional charges beyond a reasonable doubt, to secure his Sixth Amendment right to present defensive evidence, and to prepare adequately to intelligently

cross-examine the accusers about the additional crimes.

9. UNNECESSARY TRIAL DELAY: If at trial, in order to secure these rights, the trial court agrees that this accused is entitled to a continuance, then the trial will be delayed unnecessarily. That result can easily be avoided by notice to the accused at the pre-trial hearing of additional crimes which the prosecution, in good faith, reasonably expects it may attempt to prove at trial.

10. Thus, the accused moves this court to grant a continuance of this case until such time as the prosecutor provides the above-referenced information reasonably requested in this case so that this accused will not be "convicted after less than the meticulously fair trial that the

Constitution demands." Gannett Company, Inc. v. Depasquale, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979).

SUPPORTING MEMORANDUM

In order that this accused not be subjected to a "trial by ambush, in violation of the spirit of the rules", United States v. Kelly, 420 F.2d 26, 29 (2nd Cir. 1969) [where the conviction was reversed with the Court condemning such tactics], and to prevent the introduction of "other crimes" evidence which should not intrude upon this accused's trial, and to head off time-consuming and potentially prejudicial contests over admissibility before the jury, this accused seeks pre-trial disclosure of the government's intention to rely upon such troublesome evidence. The right of the accused to be

advised of such evidence prior to trial arises from basic rights to notice of the nature and cause of the accusation, to prepare a defense, to confrontation of witnesses, to effective assistance of counsel, and to due process of law itself; guarantees made by the Fifth and Sixth Amendments to the United States Constitution. These guarantees will be hopelessly frustrated if the accused does not receive notice of such evidence until it is offered against him at trial. United States v. Baum, 482 F.2d 1325 (2nd Cir. 1973).

In Baum, a conviction for possession of stolen goods was reversed where the trial court denied a defense motion for the names, addresses and telephone numbers of all Government witnesses which the prosecution intended to call, together with any record of prior felony conviction. The

Court stated, 482 F.2d at 1331-1332 (footnote omitted):

> "Confronted for the first time with the accusation of prior criminal conduct and the identity of the accuser, the defendant had little or no opportunity to meet the impact of this attack in the midst of trial. This precarious predicament was precipitated by the prosecutor."
>
> *****
>
> "It is the duty of the government to present its case against the defendant fairly. Little can be added to Justice Traynor's statement—'A defendant has hardly had a fair trial if he has been denied the opportunity to discover evidence or information crucial to his defense.'
>
> "The failure to reveal Greenhalgh's identity until he was presented as a witness, confronted the trial judge with the hard choice of interruption of the trial or denial to the defense of a reasonable opportunity of meeting the severe impact of this aspect of the prosecutor's evidence. Such tactics were condemned, and called for the reversal in United States v. Kelly, 420 F.2d 26, 29 (2d Cir. 1969). In the language of Judge Smith 'The course of the

> government smacks too much of a trial by ambush, in violation of the spirit of the rules.' To be sure, Baum's attorney did not make a very forceful showing in the district court of what cross-examination or rebuttal material he could secure. But in a case so close as this, we would rather give the defendant the benefit of the doubt than let the Government reap even a slight possibility of benefit from what we regard as a lack of candor unworthy of a prosecutor.
>
> "Here, no reason for nondisclosure was advanced by the government. Greenhalgh's testimony was crucial to the prosecution; it was equally crucial to the defense. Cf. Rovario v. United States, 353 U.S. 53, 60, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); United States ex rel Wilkins, 326 F.2d 135, 140 (2d Cir. 1964). We hold a new trial is required to afford the defendant Baum a fair opportunity to meet the critical and damaging proof of an offense not presented against him in the indictment."

Similarly, in Riggs v. United States, 280 F.2d 750, 753-754 (5th Cir. 1960), the Court reversed the conviction and strongly condemned nondisclosure of a transaction

not included in the indictment but "saved to be used as a surprise knockout blow ***** and as the record plainly and affirmatively shows, the defendant was deprived of a fair trial by the cloak and dagger manner of getting this surprise testimony into evidence ...."

There is much to be learned from the way State jurisdiction handle these problems. The Supreme Courts of several States have observed the pernicious tendencies of "other crimes" evidence and decreed special notice provisions and other safeguards. State v. Prieur, 277 So.2d 126 (La. 1973); State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965). The Oregon Supreme Court stated the necessity well when it said over sixty-six years ago, in State v. Jensen, 70 Oreg. 156, 158, 140 P. 740, 741 (1914):

> "To allow such testimony is to infringe the constitutional right of the defendant to demand the nature and cause of the accusation against him. Such procedure might be palliated if there was any provision for giving the defendant notice of the other charges in such cases; but it is utterly repugnant to justice and fair play to accuse a person of a stated crime and make that the excuse for what is really trying him for a number of others by springing them unheralded upon the attention of the jury to produce a verdict of guilty which might not result except for the bias thus imparted to the minds of the jurors."

This court, as well as this accused, has a stake in pre-trial disclosure of the intention to interject other crimes evidence into the trial. Admissibility under Rules 404(b) and 403, Federal Rules of Evidence, ordinarily poses serious questions of evidence which may delay the proceedings if litigated during the course of the trial. Moreover, if the government is allowed to spring other crimes evidence

during the trial, mid-trial continuances may be necessary in the interest of justice to allow the accused fair opportunity to meet the evidence. Finally, erroneous admission of other crimes evidence remains a common source of mistrials, appeals and retrials. Thus, it is very much in the interests of sound judicial administration to require pre-trial notice of the intention to use other crimes evidence and to resolve admissibility, to the greatest extent possible, before the jury is exposed to voir dire examination and to opening statements. See generally, 2 Weinstein's Evidence ¶404[1] at 404-13 and 404-14 (1980). Thus, in fairness to the accused and to the trial court, the foregoing motion should be granted. E.g., United States v. Stofsky, 409 F.Supp. 609, 620 (S.D.N.Y. 1973), aff'd., 527 F.2d 237 (2d

Cir. 1975), cert. denied, 429 U.S. 819 (1976).

Respectfully submitted,

/S/Joseph A. Connors III
JOSEPH A. CONNORS III
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/S/Fidencio M. Guerra, Jr.
FIDENICO M. GUERRA, JR.
ATTORNEY FOR C. B. GONZALEZ-CALLES
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(512) 682-1465

THE COURT: Overruled.

You want to stand up a minute. Stand up and I will talk to you. Stand up in place. Let me tell you what takes place at this time while you are standing.

You have already heard the evidence and arguments of the attorneys. It now becomes incumbent upon me being the Judge of the law to give you your instructions, what we call the charge of the Court. The charge of the Court is the law by which you will be governed in your deliberations. That's simply what the Court's charge is, and that is what is going to be taking place now.

It is my duty at the end of the trial to instruct you on all the law applicable to the case. You as jurors are Judges of the facts. But in determining what

happened in this case, on ther (sic) words, in reaching your decision as to the facts, it is your sworn duty to follow the law that I am about now to define to you.

I think you may be seated now. You will be more comfortable.

And, folks, you have to follow all of my instructions as a whole. You have no right to give special attention or disregard to any one of my instructions or to question the wisdom or correctness of any rule of law I may state to you. In other words, do not substitute your own notion or opinion as to what the law is or what the law ought to be. When you and I become Judges, when we take that oath, we are bound by the law whether we agree with it or disagree with it. It is your duty to apply the law as I give it to you regardless of the consequences.

By the same token, it is also your duty to base your verdict solely upon the testimony and evidence in the case, without prejudice or without sympathy. Remember we said evidence in a case is what came from this witness stand here as well as any exhibits that are admitted into evidence. That's a promise you made when you took your oath as jurors. And both sides in this case have a right to expect no less of you.

The indictment or formal charge against the defendant is indeed no evidence of guilt. The defendant is presumed by law to be innocent. The law does not require a defendant to produce any evidence or to prove his innocence or produce any evidence at all. The Government has the burden of proving him guilty beyond a reasonable doubt. If you are not satisfied from the evidence that the Government has met its

burden, then you should find the defendant guilty -- rather not guilty. You must acquit him.

Now, while the Government's burden of proof is a strict or heavy burden, it is not necessary that the Government's proof exclude all doubt. For I suppose humanly speaking it is impossible for anybody to prove to another human being anything beyond all possible doubt. What is required is that the Government's proof exclude any reasonable doubt concerning the defendant's guilt. And a reasonable doubt is a real doubt. It is based upon reason and common sense after careful and impartial consideration of the evidence in the case. The Government's burden is to prove the defendant guilty beyond a reasonable doubt. If it fails to do so, you must find the defendant not guilty.

And proof beyond a reasonable doubt is proof of such a convincing character that you would be willing to act and rely upon it without hesitation in the most important personal matters of your own. If you are satisfied from the evidence that the Government has met its burden, simply say so. If you are not satisfied, likewise simply say so.

Remember that I told you that what the attorneys said to you in their opening statements as well as what they said to you in their final arguments was not evidence. I told you at the outset of this case that I did not have an opinion about the case, although under our rules I might be able to express my opinion. It was not my intention to do anything whatsoever during the course of this trial to lead you to believe that I had an opinion. If I did so, then I am going to ask you at this time

to completely and totally disregard it, for I do not want to in any way take a part what is exclusively yours in your capacity as Judges of the facts in this case. Now, while you should consider the evidence in this case, just like the attorneys did in their final arguments, you are permitted to draw such reasonable inferences from the testimony and exhibits that you feel are justified in the light of common experience. In other words, you can make deductions and reach conclusions which reason and common sense lead you to believe from the facts that have been established by the evidence in the case.

You can consider two kinds of evidence. You can consider direct evidence or circumstantial evidence.

Direct evidence is eye-witness testimony. I saw such and such a person do

such and such a thing or I did such and such a thing.

Circumstantial evidence is a chain of events or circumstances which indicate that a person is either guilty or innocent.

You noticed during the course of this case that there was testimony regarding fingerprints.

You know on the window sill of the house that was burglarized they found some fingerprints. Nobody saw those fingerprints get there, but the fact that they are there is circumstantial evidence that there was an individual there.

Before you go to sleep you look out your back window and your lawn is dry. You go to sleep and wake up the next day at 7:00 o'clock the next morning and there are four inches of water on there. You didn't see the water get on there, but the fact that the water is on your lawn is

circumstantial evidence that something happened during the course of the night to get the water on there.

What is important to remember is, that the law does not distinguish between direct and circumstantial evidence and it leaves it to you to decide what weight to give either direct or circumstantial evidence that was presented during the course of this trial. That is exclusively within your province. You decide what weight to give any type of evidence that was submitted to you.

And I said to you, you have got to consider all of the evidence in this case. Did I ever tell you that you had to believe it? I never told you that you had to believe it, did I? Because you see you are the sole judges of the believeability and credibility of the testimony of the witnesses that came before you. You decide

what weight you want to give the testimony of any witness.

Now, how do you do that? I guess we search and we look for every human experience that we've ever had. Here are some things you should take into consideration. For example, in weighing the testimony of a witness you should consider their relationship to the Government or the defendant; you should consider whether or not the witness that came before you had an interest in the outcome of the case; the manner that that witness testified before you; the opportunity that that witness had to observe or acquire knowledge about the facts to which he or she testified; their candor; their frankness, their fairness, their intelligence, and the extent to which they have either been supported or contradicted by other credible evidence.

You may in short accept or reject in whole or in part the testimony of any witness. You can believe all of what a witness said, half of what a witness said or none of what he said.

And it doesn't make any difference if more witnesses came here to testify to one matter as opposed to a smaller number to the contrary. You decide what weight to give the testimony of any number of witnesses.

We attorneys like to use the words "discreditation" or "impeachment." And that simply means this, if it happened in this case, that there may have been in the course of this trial a showing that a witness came before you who testified falsely or contrary concerning a material matter or by evidence that at some other time the witness had said or done something or failed to say or do something which is

different than the way they testified or said they had done or not done things here before you. If that happened during the course of the trial that's what we call impeachment. If a person was so impeached, then here again it is your exclusive province to give the testimony of that witness such credibility you think it deserves. That's your authority.

We also had some expert witnesses who came here to testify before you. The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and come here and state his or her opinion to you in those matters.

Listen to this: You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you can disregard the opinion entirely even of an expert witness.

Then we come to some very important terms. Important terms because they are essential ingredients. They underlie the way we do things in this country. For a person to engage in such conduct that on the face of things it makes that person look like he or she is guilty, but if the person did not have the required state of mind -- and in this case these terms become

very important -- the person didn't have the required state of mind, knowledge or willfully engage in misconduct, you can't find that person guilty.

The first thing I want to define to you is the fact -- you will notice in the indictment the indictment uses the term "on or about" a certain day. The proof doesn't have to establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in this case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged. I don't think that matter is in issue in this case.

Than we come to two very important terms, two very important terms. The word "knowingly." The word knowingly means that the act was done voluntarily and intentionally -- because you wanted to do it voluntarily and intentionally -- and not

by accident or mistake. And then we come to "willfully." And "willfully" means that the act was committed voluntarily and intentionally -- because you wanted to do it -- and purposely and with the specific intent to do something that the law forbids -- and with the specific intent to do something that the law forbids. That is to say, with bad purpose either to disobey or disregard the law. Remember those terms. They are going to be coming back to you.

Now what do you have? In this case you have a four-count indictment. We are going to call Counts 2 and 4 the substantive counts. Counts 1 and 2 allege a conspiracy. Count No. 2 alleges a substantive count or the alleged importation into the United States from another country 125 pounds gross weight of a controlled substance. I will tell you now cocaine is a controlled substance.

That is what they call narcotics. Count No. 4 alleges the knowing and intentional possession, with the intent to distribute, approximately 125 pounds of the controlled substance. In this case it being cocaine.

Let me first define to you what is required before you can find the defendant guilty of either Counts 2 and 4. Then I will come back and define to you what a conspiracy is, because an integral part of a conspiracy entails the fact that there was a scheme to violate a substantive law.

We will start with Count No. 4. Count No. 4 alleges the possession, with intent to distribute, cocaine in the amount alleged in the indictment. It is against the law for anybody to knowingly or intentionally -- remember knowingly and intentionally -- possess, with intent to distribute, a controlled substance. Cocaine is a controlled substance.

Before you can find the defendant guilty of Count No. 4 you must be satisfied from the evidence beyond a reasonable doubt that the defendant knowingly and willfully possessed the cocaine as charged.

And, in addition to that, making references to Count No. 4, in addition to that, you must also be satisfied beyond a reasonable doubt from the evidence that he possessed the substance with the intent to distribute it. And possession with intent to distribute simply means to possess with the intent to deliver or transfer possession of a controlled substance to another person with or without any financial interest in the transaction. Simply passing it on to somebody else.

Further, I will tell you that you can consider the amount of the controlled substance in question as would regard the

element of the intention to distribute. You can consider that.

Now, if you are not satisfied from the evidence beyond a reasonable doubt that the Government had met its burden in regard to those elements in Count No. 4 you should find the defendant not guilty of Count No. 4.

Then we go to Count No. 2, because Count No. 2 alleges the alleged importation of the controlled substance in question. Well, in order for a person to import he has to be guilty of possession. Now, I am going to define possession to you in a few minutes because we have both actual and constructive possession. And I will simply tell you at this time, you don't have to have something in your hands to be legally in possession thereof because you might have constructive possession thereof. And I will define it for you.

In Count No. 2 it is alleged that the defendant imported into this country the amount of cocaine in question. Simply put, it is against the law for a person to import into the United States a controlled substance. In order for a person to be guilty of Count No. 2, then, he must, of course, have either actual or constructive possession as I am going to define it for you -- and remember the elements of possession -- and bring it into this country.

If you are satisfied from the evidence that the Government has met its burden as would regard Count No. 2 by proof beyond a reasonable doubt, you should find the defendant guilty. If you are not satisfied, you should find the defendant not guilty. Which brings us then to Count No. 1 and 3.

"Conspiracy" is just a big word. It really is. But maybe I can help you by first giving you an example of what a conspiracy is.

Mr. Holloway and I -- by the way, I tell this to every jury -- don't make enough money. Also ask our jurors to write our Congressmen and tell them, too. But that's neither here nor there. So what he and I decide to do, we decide we are going to find a way to get more money. So we go to my office. We don't have a formal meeting. We don't put it in writing. Nobody else is there. And he and I decide that the way we are going to get more money is to rob a National Bank. Robbing a National Bank is a violation of law. All of us know that. Robbing a Federal Bank is a violation of law.

So for the purpose to engage in this scheme we solicit the services of Mr.

Ramirez. Then we ask Mr. Ramirez to go rent a get-away car. The moment that Mr. Ramirez goes to rent that get-away car we have committed a violation of law. We have engaged in a conspiracy.

Doesn't make any difference if we didn't rob the bank. By the same token, if we robbed the bank, it doesn't make us any less guilty. You understand that.

Now, the difference in an ordinary conspiracy and a conspiracy in a case involving narcotics or drugs is that the Government doesn't have to allege the overt act committed by Mr. Ramirez nor prove the overt act that Mr. Ramirez committed.

So you see a conspiracy simply means that two or more persons get together and engage in a plan to violate the law. It is a kind of partnership in criminal purpose in which each member becomes the agent of each other member. The gist or essence of

the offense is a combination or mutual agreement by two or more persons to disobey, or disregard, the law.

There are some things that the evidence doesn't have to show you as would regard Counts 1 and 3, that is, the counts on conspiracy.

Count 1 alleges a conspiracy to import into this country a controlled substance. Count 3 alleges a conspiracy to possess it with intent to distribute it.

There are some things the Government doesn't have to prove to your satisfaction beyond a reasonable doubt before you can find the defendant guilty of either Counts 1 and/or 2. What the Government doesn't have to prove to you is not what's important. What is important is what the Government must prove to you.

For example, the Government doesn't have to show you that -- the case need not

show that the alleged members of the conspiracy entered into any expressed or formal agreement -- they didn't have to do that in writing -- or that they directly stated between themselves the details of the scheme and its object or purpose, or the precise means by which the object or purpose was to be accomplished. Similarly, the evidence in the case doesn't have to establish that all the means or methods discussed or may have been alleged in the indictment were in fact agreed upon to carry out the alleged conspiracy, or that all of the means or methods which were agreed upon were actually used or put into operation. Neither must it be proved that all of the persons charged to have been members of the conspiracy were such, nor that the alleged conspirators actually succeeded in accomplishing their unlawful

objectives. That's what the Government doesn't have to prove.

Here is what the Government must prove to your satisfaction beyond a reasonable doubt before you can find Robert Gonzalez-Calles guilty of Count No. 1 and/or Count No. 3.

That two or more persons in some way or manner, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment. That two or more persons engaged in a plan to violate the law.

In addition to that: That the defendant knew of, intended to join and willfully participated in the conspiracy; that the defendant knew of, intended to join and willfully participated in the conspiracy.

If you are satisfied that the Government has proven those elements to you

as would regard Count No. 1 and/or Count 3 you should find the defendant guilty. If you are not satisfied that the Government has met its burden of proving those matters to you beyond a reasonable doubt, you should find the defendant not guilty of Count No. 1 and/or Count No. 3.

Knowledge, actual participation and criminal intent are the necessary elements of a conspiracy. The Government must prove each of those elements beyond a reasonable doubt.

You can become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So, if a defendant, with an understanding of the unlawful character of a plan, knowingly and willfully joins in an unlawful scheme on one occasion, on one occasion, that is

sufficient to convict him for conspiracy even though he had not participated at earlier stages in the scheme and even though he played only a minor part in the conspiracy. In order to establish participation in a conspiracy, the Government must show more than mere presence or association. Just because you are there or just because you associate with persons doesn't make you guilty.

Mere presence at the scene of an alleged transaction or event, or mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. There must be evidence that the individual defendant had knowledge of the conspiracy. Also, a person who has no knowledge of a

conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not thereby become a conspirator. You must have a knowing and willfull (sic) participation in the event.

In your consideration of the conspiracy offenses as alleged in the indictment you should first determine, from all of the testimony and evidence in the case, whether or not the conspiracy existed as charged. If you conclude that a conspiracy did exist as alleged, you should next determine whether or not the defendant under consideration willfully became a member of that conspiracy. I told you that I was going to define "possession." It is not necessary that I have this pen in my hand, in my actual physical possession, for me to be in possession thereof, because the law recognizes two kinds of possession. The law recognizes actual possession, which

is this in my hand, and constructive possession.

Sort of like, for example, you can be in Harlingen, Texas, and send somebody to get something for you in Matamoros. And although whatever he brought from Matamoros is not in your possession, you can lawfully be in constructive possession what he brought from Matamoros. Because, you see, under the law a person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, then that person is considered to have constructive possession thereof. You can also infer the matter of the element of possession from the fact that an individual has control over, let us say, a vessel or a plane or a car or a house. But in order for you to find that a

person has either actual or constructive possession thereof --

You need a recess, ma'am? Take her with you, please. Do any of you want a recess? I am about done.

(Short recess.)

THE COURT: I appreciate she asking. Remember the old days when you used to try cases and people worked until 10:00 or 11:00 o'clock. The Judge didn't recess.

Are you comfortable, ma'am? I am glad you called it to my attention. Don't you worry about it one bit.

Okay. I was telling you about possession. And I was also telling you, my recollection is, for example, you can infer a person has possession over something if he has control over it. For example, he is the driver of a vehicle or pilot of a plane or the like. But do not forget that before you can find a person guilty of having

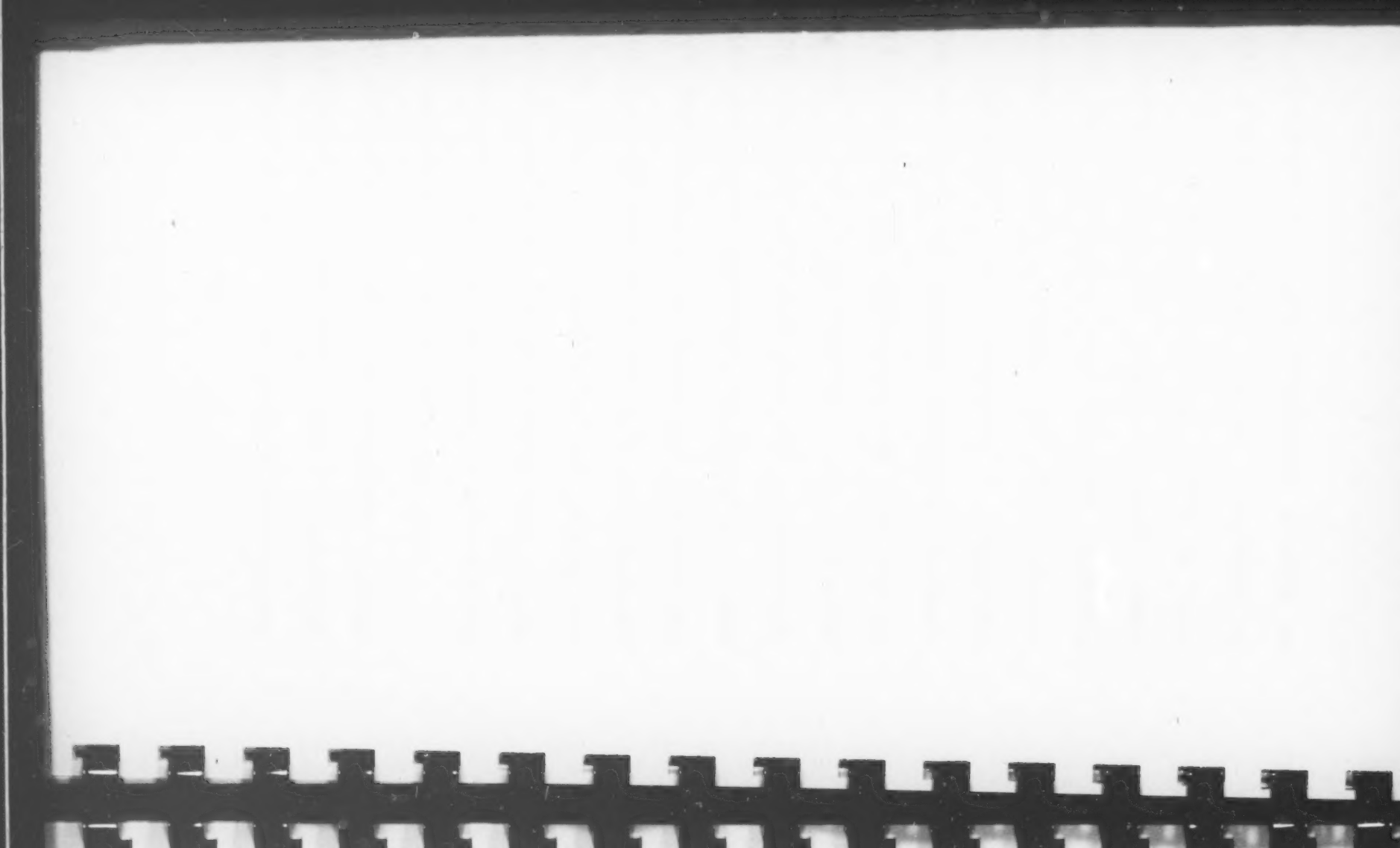
something in his possession you must also be satisfied from the evidence beyond a reasonable doubt that the person knowingly and willfully had control over the matter. Please don't forget that. The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of at thing possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession as that term is used in these instructions is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

Then we come to another matter. I know that you've heard of the law of aiding and abetting. One very good way of introducing the law of aiding and abetting

is simply translate what is commonly used in Spanish: He who holds the cow's leg is just a (sic) guilty who shot it in the head. Because under our laws a person who commits an offense against the United States, if he aids, abets, counsels, commands, induces or procures its commission, that person is just as guilty as the one who actually did it because he helped to accomplish the unlawful objective. So you see the law recognizes that, ordinarily anything a person can do for himself may also be accomplished by him through the direction of another person as his agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

So, if the acts or conduct of an agent, employee or other associate of the defendant are willfully directed or authorized by him, or if the defendant aids



and abets another person by willfully joining together with such person in the commission of a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though he had committed the acts or engaged in such conduct himself.

Here again remember this: That before any defendant may be held criminally responsible for the acts of others it is necessary that the accused willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in something he wishes to bring about; that is to say, that he willfully seek by some act or omission of his to make the criminal venture succeed. And here again, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed

or aided and abetted the crime unless you find beyond a reasonable dbout (sic) that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable dbout (sic) that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant willfully participated in its commission.

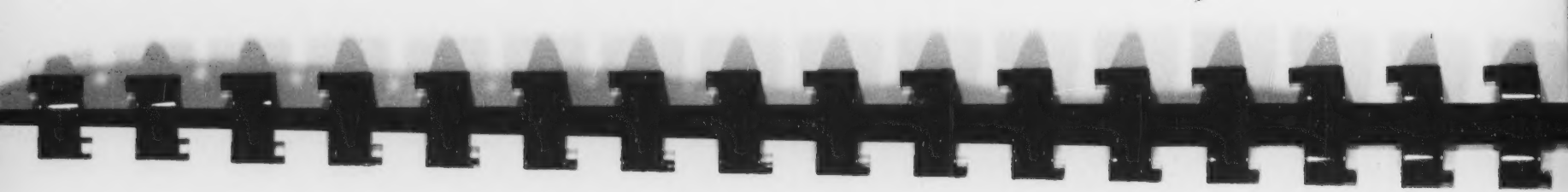
A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

I caution you, members of the jury, that you are here to determine the guilt or

innocence of the accused from the evidence in this case. He is not on trial for any act or conduct or offense not alleged in the indictment. Neither are you called upon to return a verdict as to the guilt or innocence of anybody else, any other person, not on trial as a defendant in this case.

Also, the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court or the Judge, and the jury should never consider punishment in any way in arriving at an impartial verdict as to the guilt or innocence of the defendant.

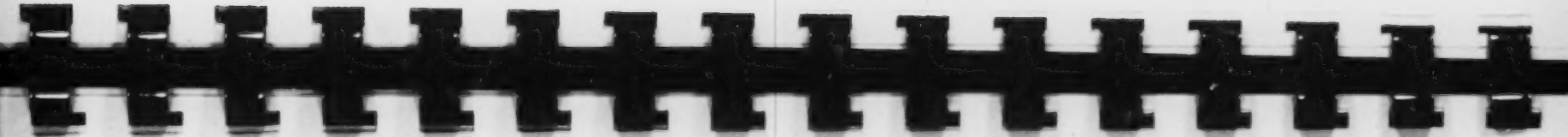
Now, any verdict that you return as to all four counts must be the considered judgment of each juror. In order for you to return a verdict, all twelve of you who will be deliberating must unanimously



agree. There must be unanimous agreement in order to reach a verdict.

It is your duty as jurors to consult with one another in an effort to reach an agreement if you can do so without violence to individual judgment. You have got to decide the case for yourself but you do that after careful and impartial consideration and discussion of all the evidence in the case with your fellow jurors.

And in the course of your deliberations don't hesitate to change your mind if you are honest to goodness convinced you are wrong. For God's sake don't change your mind just simply to reach a verdict in the case or to satisfy your fellow jurors. You are Judges and the only thing you are interested in is in ascertaining and determining the truth.



The first thing you will do when you go to the deliberation room is you will select one of your members as your foreperson. That individual will preside in your deliberations and also will be your spokesperson in the courtroom.

I have prepared a form of verdict which is quite simple. It addresses each count. And has a space for you to insert "not guilty" or "guilty" for each and every one of the counts. Further, a space for the foreperson to sign and, of course, to date the verdict.

You are going to take those into the jury room with you. And when you have reached a unanimous agreement, the foreperson should fill in the blank indicated and then you will be returned to the courtroom so your verdict can be made public.

If during your deliberations you wish to communicate with the Court -- and I am not encouraging you to communicate with me and I am not discouraging you to communicate with me -- I am going to ask that you please do it in writing. Have the foreperson sign it, date it, put the hour on it. And if it is consistent with what your conscience dictates, you continue your deliberations I guarantee you I am not ignoring any communication. I may be in something else or I may be looking for an answer to your communication. But if it is consistent with what your conscience dictates, you continue your deliberations. I will respond as promptly as possible, I'll guarantee you.

Then I am going to ask you to do me one final favor. If you do communicate with me, please don't specify your numerical division. So many one way, so

many another. Please don't do that at any time.

At this point I must give the attorneys an opportunity to address me. It has to be done outside of your presence. I am going to ask that you be taken to the hallway.

Everybody rise and remain in place.

(Jury left courtroom.)

THE COURT: Any objection from the Government?

MR. WOLFE: It is not in the form of an objection. In my opinion sometimes the jurors get confused sometimes as to the verdict. I know the Court was explicit that it must be unanimous. In the Government's opinion they think it is unanimous only to find guilty. They don't think it is unanimous to find not guilty.

I wish the Court would tell them, "Ladies and gentlemen, it takes twelve of

you to find the defendant guilty. It takes twelve of you to find the defendant not guilty."

THE COURT: Maybe we will do it next time. All right, sir. Any objection from the defendant? Remember that everything you have favored me with you preserve your exception thereto.

MR. CONNORS: Your Honor, I have several. Could the Clerk show the Court Carlos' No. 1. You covered about 90 percent of it. I wanted to cover a few paragraphs with you.

THE COURT: That you preserve your exception thereto.

MR. CONNORS: I am not sure the Court did "burden of proof." You remember doing that, Your Honor?

MR. WOLFE: I thought the Court was --

MR. CONNORS: About telling them hesitation in personal affairs.

THE COURT: You mean proof of doubt -- proof beyond a reasonable doubt. The burden of proof.

MR. CONNORS: I don't mean burden of proof.

THE COURT: Proof beyond a reasonable doubt, I most definitely did.

MR. CONNORS: The fact that the indictment is no evidence.

THE COURT: Yes, sir.

MR. CONNORS: That is all --

THE COURT: You preserve your exception thereto.

MR. CONNORS: That's all in Carlos 1. I have several others, Your Honor.

THE COURT: Go ahead. Hurry up.

MR. CONNORS: I would like the Court to charge on the availability of the exhibits. How they obtain them.

THE COURT: They are going to take the exhibits.

MR. CONNORS: I didn't know that, Your Honor.

THE COURT: Except the cocaine. If they ask for it, I will send it to them.

MR. CONNORS: I would ask the Court to charge the fact that Carlos Benjamin is no longer in the lawsuit.

THE COURT: I already have.

MR. CONNORS: Your Honor, Robert Gonzalez' jury instruction No. 15 went to whether he was -- if he was ignorant of the fact cocaine was in the plane, that ignorance of fact goes to the heart of his defense and if --

THE COURT: I think I covered that in my instruction. They were told, if he didn't know about it, he didn't willfully engage in the conduct, they couldn't find him guilty. You preserve your exception thereto.

MR. CONNORS: Your Honor, the fact that there were witnesses not called by the Government or by me, you didn't give it to them in the final charge. You said it during the argument.

THE COURT: I think they have already been instructed.

MR. CONNORS: Your Honor, the Court, as far as I know, did not charge that there is no inference of guilt because the man was arrested, detained or even still in custody. I would ask that you do that. I know I charge on it but I don't count.

THE COURT: The Court did charge them on presumption of innocence.

MR. CONNORS: He testified that he was in jail, Your Honor, on the stand when he saw Victor. He testified he was detained when this happened.

THE COURT: Denied. I think the Court has already covered that on the presumption of innocence.

MR. CONNORS: One other, Your Honor. We would ask -- I guess we object. The Court failed to instruct as follows; that one of the defensive theories was that someone knowingly conspired with others who are not on trial before the jury to frame my client, Robert Antonio Gonzalez-Calles, for the charges in this case. Facts adduced in support of this theory created in the jurors minds a reasonable doubt of guilt of these charges and the jury must find the defendant not guilty.

THE COURT: That will be denied. You will preserve your exception. Any others?

MR. CONNORS: Your Honor, as to similar acts, since there was some insinuations as to similar acts, and finally in jury argument --

THE COURT: I don't remember any evidence to that effect.

MR. CONNORS: Is that one overruled, Your Honor?

THE COURT: Yes, sir.

MR. CONNORS: That is all, Your Honor. We have no further --

THE COURT: You preserve your exception. Bring the jury in. Everybody be seated.

(Whereupon the jury re-entered the courtroom, the alternate jurors were excused and the jury retired to deliberate. At 4:15 p.m. the jury returned its verdict in open court.)

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RELEVANT JURY ARGUMENT (4R. 695-698)

Ladies and gentlemen, out in our neighborhoods and out in the community that we grow up in and live in, I don't have to tell you the effects that drugs has. You know the families that have been affected. You know the lives that have been ruined. You know what it causes. And Mr. Connors says we are not being fair. Do you think --

MR. CONNORS: Your Honor, we are not trying every lawsuit in cocaine in the United States or marijuana or pills.

THE COURT: Confine yourself to matters in this case, Mr. Wolfe.

MR. CONNORS: Is my objection overruled?

THE COURT: Yes, sir. The jury has been instructed accordingly.

MR. WOLFE: You think that he is being fair when he brings this cocaine into the country?

When you go back in the jury room you are going to have to make a tough decision. You are going to have to decide what happened. And it is not going to be easy. I will tell you it is not going to be easy. It never is and it is not supposed to be. That's why we have twelve people here. If it was easy we wouldn't have juries.

But you are an important link in the chain of criminal justice. And the chain is only as strong as its weakest link. When you go in that jury room don't be the weak link. Be the strong link.

The Customs officers have done their job. The Court has done its job. The Government has presented its evidence to you. You be the strong link. You tell the defendant and his associates if they bring cocaine into South Texas that we are going to be waiting for them. And you tell them that no matter how clever they are that

they are not going to escape justice that comes to South Texas with their poison.

When you go back in that jury room, ladies and gentlemen, I know you are going to agonize. In your own life you probably had to make a decision in regards to an operation or something like that. And it is not easy for you or for a family member to make those kind of decisions. It is a tough decision to go into the doctor and go into the hospital and have them take out that scalpel and go in there and cut and remove some cancer.

I will tell you right now, in this country we have got a cancer and it is called "cocaine." It might be painful for you, but you have got to go in there and you have got to take out that scalpel and you have got to cut it out. If you don't cut it out, ladies and gentlemen, it is going to grow and grow until it consumes us

all. And he is the virus that spreads it through his airplanes.

MR. CONNORS: I object, Your Honor, that was in the plural. Seems to infer something about similar acts.

MR. WOLFE: I thought he said he had flown several airplanes, ladies and gentlemen.

MR. CONNORS: Would the Court --

MR. WOLFE: He spreads --

THE COURT: What is your objection, please?

MR. CONNORS: The insinuation is, he is spreading cocaine on more than one airplane, Your Honor. And he is forgetting about knowingly, but he is saying numerous airplanes.

THE COURT: If any reference is made to any matters not regarding the evidence in this case, you are to completely and totally disregard it. We are not trying

anything else except what's in the indictment and what was presented to you as evidence in this case. Any reference or intimation that is made to the contrary, you are to completely and totally disregard it. Those are my instructions to you.

MR. CONNORS: Then I respectfully move for a mistrial.

THE COURT: Denied.

MR. WOLFE: He is spreading this virus through his airplane TG-BEQ. Fortunately we stopped him. But if you let him go, like Mr. Connors, said, he only lost $30,000 and half-a-million. And on his next trip, if he gets through, he can make it up. That's what Mr. Connors told you.

Thank you, ladies and gentlemen.

MR. CONNORS: I object to the last three sentences. I never told the jury that, Your Honor.

THE COURT: Overruled.